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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NORTH BAY DEVELOPMENT DISABILITIES SERVICES, INC., D/B/A NORTH BAY REGIONAL CENTER,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the amount of the agency fee to be paid by non-union workers under union security agreements negotiated under § 8(a)(3) of the Act, is a mandatory subject of bargaining under this Court's decision in *Communications Workers of America v. Beck*, for which information must be provided in the bargaining process.

2. Whether the court of appeals correctly concluded that the union did not violate § 8(b)(3) of the Act by refusing to furnish information to the employer concerning the agency shop fee it had agreed to furnish in negotiations, and required under express contractual language, when that information is essential for the employer to participate effectively in contract negotiations and arbitration conducted under the agreement to set the agency fee.[1]

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[1]North Bay Development Disabilities Services, Inc., is a non-profit corporation. It has no parent companies or subsidiaries.

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No. 90-

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

NORTH BAY DEVELOPMENT DISABILITIES SERVICES, INC., D/B/A NORTH BAY REGIONAL CENTER, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

North Bay Developmental Disabilities Services, Inc., d/b/a/ North Bay Regional Center ("North Bay"), the charging party before the National Labor Relations Board ("Board"), respectfully prays that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the District of Columbia Circuit which enforced the Board's decision in the above-styled case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 905 F.2d 476 (D.C. Cir. 1990). The decision of the National Labor Relations Board is reported at 287 N.L.R.B. No. 1223, 127 L.R.R.M. (BNA) 1184 (1988). Both decisions are reprinted in

the attached appendix at pages 1a and 8a, respectively.[1] Two unreported orders of the Board are reprinted at pages 26a and 27a. The decision of the administrative law judge is reprinted at page 10a.

JURISDICTION

The judgment of the Court of Appeals was entered June 15, 1990. An application for extension of time to file this petition for writ of certiorari was granted by Chief Justice William H. Rehnquist on August 30, 1990, to and including October 5, 1990. (No. A-163). This Court has jurisdiction to review the judgment of the District of Columbia Circuit under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a), provides in relevant part:

> (a) It shall be an unfair labor practice for an employer--
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization...to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment, whichever is the later....

Section 8(b) of the National Labor Relations Act, 29 U.S.C. § 158(b), provides in relevant part:

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[1] "a" references in this Petition are to the accompanying appendix. "J.A." references are to the separately printed Joint Appendix filed in the court below.

(b) It shall be an unfair labor practice for a labor organization or its agents-

> (3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title....

Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d), provides:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

STATEMENT OF THE CASE

A. Statement of Facts

North Bay is a non-profit California corporation which provides and obtains services for developmentally disabled persons. Its principal offices are in Napa, Solano and Sonoma Counties, California. 11a. It employs approximately one-hundred office, professional, and social workers. These workers are represented by the Social Services Union, Local 535, Service Employees International Union, AFL-CIO, ("Local 535" or "union").

The collective-bargaining agreement relative to this proceeding was entered into on October 6, 1986, and was effective through September 30, 1988. 12a. Article VI, Subsection A of the agreement provided that the employees covered by the

agreement would be subject to an agency shop, and that those persons not becoming members of the union would be required to pay a service fee in an amount not to "exceed that amount outlined or required by pertinent case law" and the parties agreed to meet to set the amount to be paid:

> Agency Shop. Each employee covered by this Agreement who is hired after September 12, 1986 shall, as a condition of continued employment, within thirty (30) days of first employment at the Center, either 1) become and remain a member in good standing of the Union, or, 2) commence and continue to make payment(s) of an amount equal to the Union's periodic dues and initiation fees to the Union as a service fee for union representation, except such amount shall not exceed that amount as outlined or required by the pertinent case law.
>
> *The parties agree to meet and develop language to be included in this agreement concerning the amount of Agency fee to be paid in lieu of Union dues by persons in the unit who do not belong to the Union. The parties agree to be bound by the relevant U.S. Supreme Court Decisions on the subject.* Such discussion shall be held during the months of November and December, 1986 and resolution shall be attained by December 31, 1986 or the issue shall be submitted to an arbitrator from a panel supplied by the American Arbitration Association (AAA).

12-13a (emphasis added).

On November 29, 1987, the employer's bargaining representative wrote the business agent for Local 535, and suggested that the non-union agency fee payers be compelled to contribute only 20% of full union dues per the agreement. 14a; J.A. 183. He also requested that if the "above suggested language or percentage amount is unacceptable," that the union provide the employer with disclosure of revenues and expenditures through which

"we will jointly be able to identify the correct percentage, if twenty percent proves incorrect." 14a; J.A. 184.

In order to prepare for negotiations and to "bargain effectively," J.A. 45, North Bay requested the following information from the union to the extent "available in a CPA-audited format and grouped by category of expenditure [if] that format would be preferable," or in whatever form the union chose to supply, J.A. 60:

> 1. A detailed breakdown of all revenues and expenditures of Local 535 for the most recent period and the previous three years.
>
> 2. A detailed breakdown of all revenues and expenditures of the Service Employees International Union for the most recent three fiscal years, and
>
> 3. Any other documents which you feel to be relevant to the process of defining the appropriate amount for the Agency fee to be paid by nonmembers in the NBRC unit.

15a; J.A. 184.

In a letter to North Bay dated January 8, 1987, the union explained that it was their position that,

> we are in full compliance with relevant U.S. Supreme Court decisions....Where the Court has considered similar issues the employers and the employees were not covered by the Act but rather were covered by other legislation, e.g., local public sector laws....Regarding your request for financial data (made in your letter of November 29, 1986), we will reiterate that NBRC management does not have a right to such data and we decline to provide such.

15a; J.A. 186.

Since Article VI, Section A, of the collective bargaining agreement required that the parties "meet and confer" to "develop language to be included in this agreement" and "resolution shall be attained by December 31, 1986 or the issue shall be submitted to an arbitrator," North Bay invoked the arbitration clause of the agreement. J.A. 46, 187.

The arbitrator subsequently ruled that the agency fee should be set at 100% of union dues.

B. Summary of the Opinions Below

On January 21, 1987 and February 12, 1987, petitioner North Bay, filed unfair labor practice charges with the National Labor Relations Board, Region 20, alleging that Local 535 had committed an unfair labor practice during the course of their collective bargaining agreement by refusing to negotiate with and supply information to North Bay as required by the agreement, and also for refusing to supply information to North Bay in preparation for binding arbitration. J.A. 20.

The General Counsel of the Board issued a Complaint against the union on March 5, 1987, alleging violation of the duty to supply information necessary and relevant to negotiation and arbitration of the parties' collective bargaining agreement. J.A. 23.[2]

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[2]The General Counsel's Complaint alleged:

"8(b). The information requested by North Bay, as described above in subparagraph 8(a), is necessary for and relevant to matters encompassed within the duty to bargain and related arbitration matters.

9. Since on or about December 12, 1986, respondent has failed and refused, and is failing and refusing to furnish North Bay the information requested by it as described in paragraph 8.

10. By the conduct described above in paragraph 9, Respondent has failed and refused, and is failing and refusing to bargain collectively with an

A hearing on the Complaint was held before an Administrative Law Judge ("ALJ"). On July 24, 1987, the ALJ determined that none of the charges alleged in the complaint had merit and that information sought by North Bay was unrelated to a mandatory subject of bargaining. He therefore concluded that Local 535 had not violated section 8(b)(3) of the Act.

The Board, ruling on the exceptions to the ALJ's Decision filed by North Bay, summarily agreed with but only a single conclusion of the ALJ, 9a,

> that the amount of agency fees is a nonmandatory subject of bargaining and that it is not transformed into a mandatory subject by virtue of the parties' agreement to bargain concerning it. Inasmuch as the duty to provide information is coextensive with the statutory duty to bargain concerning mandatory subjects, we agree that the Respondent had no duty to provide information requested here. We therefore find it unnecessary to pass on the additional reasons set forth by the judge for his conclusion.

The Board therefore declared that Local 535 had not failed to negotiate with the North Bay over the matter of agency shop fees.

On a petition for review of the Board's Decision and Order, the court of appeals determined that the Board's analysis was "reasonably defensible" under its authority to construe the Act, 3a, concluding that the amount of the agency fee was akin to an internal union matter that is "shielded from Board regulation by § 8(b)(1)(A)" and therefore the amount of the fee is not a mandatory subject of bargaining to which an employer need not be cautious to conclude, despite a potential for liability under

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employer, and Respondent thereby has been engaging in unfair labor practices within the meaning of Section 8(b)(3) of the Act."

§ 8(a)(3) for exacting too much dues under *Communications Workers of America v. Beck*, 487 U.S. 735 (1988). 6a. Furthermore, the court of appeals concluded that the parties' contractual obligation did not implicate a trend of industrial practice under which the matter had turned or could turn into a mandatory subject of bargaining. 7a.

REASONS FOR GRANTING THE WRIT

THE WRIT SHOULD BE GRANTED TO SETTLE THE CONFLICT BETWEEN THE CIRCUIT COURT'S CONCLUSION HERE THAT THE AMOUNT OF THE AGENCY FEE IS NOT SUBSUMED AS PART OF THE MANDATORY BARGAINING SUBJECT OF UNION DUES AND AGENCY FEES UNDER SECTION 8(a)(3) OF THE ACT AND THIS COURT'S CONCLUSION IN *BECK* THAT THE STATUTE PROHIBITS "COLLECTION" OF AGENCY FEES IN AMOUNTS IN EXCESS OF GERMANE BARGAINING UNIT EXPENSES

The decision below conflicts with the decision issued by this Court concerning the limitations on union dues placed by Congress in the National Labor Relations Act ("NLRA"). In *Communications Workers of America v. Beck*, 487 U.S. 735, 108 S. Ct. 2641 (1988), the Court concluded that the union's collection of agency fees for purposes unrelated to collective bargaining expenses was a violation of section 8(a)(3) of the Act and was also a violation of the union's duty of fair representation. The decision below artificially assigns § 8(a)(3) liability to the union only, in agency fee cases, by disregarding the fact that § 8(a)(3) is an employer unfair labor practice that should equally apply to employers "as permitting the *collection* and use of only those fees germane to collective bargaining." *Beck*, 108 S. Ct. at 2652 n.8 (emphasis added). The court below also reads out of the statute the *Beck* conclusion that "[i]t simply does not follow from this that Congress left unions free to *exact* dues equivalents from nonmembers in any amount they please, no matter how unrelated those fees may be to collective bargaining." 108 S. Ct. at 2655 (emphasis added).

Unless review is granted in this case, this issue will never be presented again to the Board through an unfair labor practice complaint filed by the Board's General Counsel. Neither will there be the opportunity for this Court to reconsider this question. Writing out of § 8(a)(3) the employer's responsibility to consider the amount of dues to be "exacted" from its workers, leaves employer's entirely unprotected from hybrid breach of contract/duty of fair representation lawsuits by these workers. For these reasons, the decision below poses a grave threat to employers who seek to comply with the law and protect themselves from potential liability in these burgeoning number of agency fee lawsuits.

I. BY NEGOTIATING AN AGENCY FEE AND CHECK-OFF UNDER THE AUSPICES OF SECTION 8(a)(3) OF THE ACT, THE UNION VOLUNTARILY IMPLICATES THE EMPLOYER IN ITS STATUTORY BARGAINING OBLIGATION AND TAKES THE EMPLOYER INTO A LIMITED RELATIONSHIP THE UNION MIGHT OTHERWISE HAVE HAD ONLY WITH THE EMPLOYEES

The court of appeal's acceptance of the Board's limited showing that the amount of an agency fee involves solely a union-employee relationship, which is outside the mandatory subject of bargaining, sidesteps the entire issue in this case, *viz.*, that North Bay has made a relevant request for information. However, to the extent that the Board and the court below do address the subject of agency fees, their cases support other propositions clearly not transferable to the matters here pertaining, and ignore North Bay's argument that the law is otherwise as stated by this Court in *Communications Workers of America v. Beck*, 487 U.S. 735, 108 S. Ct. 2641 (1988); *NLRB v. General Motors*, 373 U.S.

734 (1963),[3] and the explicit language by the Ninth Circuit in *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996 (9th Cir. 1970), that collection of only germane expenses is an implied term of every agency fee contract negotiated by employers and labor organizations.

The fault with the court of appeal's analysis stems from the cases referred to by the court which suggest that an employer cannot insist in contract negotiations, in certain instances involving formal union members, that the union bargain concerning its members' rights, which arise contractually between the union and the member: *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958)(employer unlawfully insisted that the contract be submitted to employee vote, but "would be enforceable if agreed to by the unions"); *U.O.P. Norplex, Div. of Universal Oil Prod. Co. v. NLRB*, 445 F.2d 155 (7th Cir. 1971)(employer may not insist to impasse on union's withdrawal of fines imposed on members who crossed picket line). These cases are inapposite, because the proper comparison in these cases must be between the union and nonmembers.[4]

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[3]In *NLRB v. General Motors*, 373 U.S. at 742, the Court explained that "[i]t is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. 'Membership' as a condition of employment is whittled down to its financial core."

[4]In *U.O.P. Norplex*, the Seventh Circuit explained the effect of the Court's decision in *Scofield v. NLRB*, 394 U.S. 423 (1969). In *Scofield*, the union rule established fines for exceeding a union production ceiling. Although nominally an internal union rule, the Court found it "was intended to have an impact beyond the confines of the union organization," 394 U.S. at 431, and therefore might become a mandatory subject of bargaining. "If all union rules were non-mandatory bargaining items, the union could avoid its obligation to bargain by merely incorporating into a union rule the area concerning which it does not wish to bargain." 445 F.2d at 159 n.10. Of course, the union security provision bargained by the union and Petitioner North Bay is not an internal union rule independently binding upon non-union employees, for the provision does not stand as contractual right of obligation entered into between the union and these

The decision in *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952), demonstrates that the court of appeals' rigid understanding of collective bargaining in this circumstance is wrong. In that case, this Court established that the Board cannot sit in judgment of specifically agreed to terms of a contract or compel one party to concede a point or one party to accept a bargaining proposal only as the Board might deem fit. The Board and the court below appear to suggest that collective bargaining as to the amount of agency fees is unlawful, in much the same way as the Board tried to deny to the employer the ability to obtain a management functions clause in *American Nat'l Ins. Co.*, even under circumstances where: "[b]argaining for more flexible treatment of such matters would be denied employers even though the result may be contrary to common collective bargaining practice in the industry." 343 U.S. at 408. However, this Court ruled that the "Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreements." 343 U.S. at 408-09. If the parties agree to flexible treatment of such matters, "the extent of union and management participation in the administration of such matters *is itself a condition of employment* to be settled by bargaining." *Id.* at 409 (emphasis added).

The court below, then, fundamentally misconstrues the setting in which a matter may become a term or condition of employment, especially when the employer and union have themselves bargained over a specific matter.[5] The right to

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nonmember employees. To so limit the proviso to § 8(b)(1)(A), as the court of appeals did, 4a, completely writes *Beck* out of the statute, effectively reinstating the Board's losing position in *Beck*, as the prevailing rule of law. *See also*, note 22, page 23, *infra*.

[5]To the extent the court below also implies that the issue of the amount of dues is an internal union matter, 5a, the Board made no distinction between dues which the union might assess on individual union members via their membership agreements and the payment of an agency fee for nonmembers which might only be established by the independent contract with the employer and could not be independently obtained by a union's private state court suit against the

bargain for any such payment of dues to unions from the employer's funds, out of employee wages, is permitted only in conformity with § 302(c)(4), 29 U.S.C. § 186(c)(4), which states:

> It shall be unlawful for any employer...to pay...any money or other thing of value- (1) to any representative of any of his employees who are employed in an industry affecting commerce
>
> (c) Exceptions. The provisions of this section shall not be applicable...(4) with respect to money deducted from the *wages* of employees in payment of membership dues in a labor organization

Clearly, the statute itself shows that dues payments come from the wages of the workers and "wages" are specifically a covered topic in § 8(d)'s statutory requirement for bargaining.[6] The amount of the agency fee also plainly involves a "question

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nonmembers otherwise because there would be a lack of privity. *See Scofield*, 394 U.S. at 426 n.3.

[6]In *Teamsters, Local No. 391 v. Terry*, 110 S. Ct. 1339 (1990), the Court ruled that a union's violation of the duty of fair representation was subject to a jury trial. In so concluding, it ruled that damages (backpay) for a union's breach of its duty "is not money wrongfully held by the Union, but wages and benefits they would have received from McLean had the Union processed the employees' grievances properly." 110 S. Ct. at 1348. Similarly, the union's assertion to North Bay that it should deduct 100% of union dues from nonmembers, implicates § 8(d) towards nonmembers for "wages and benefits they would have received from [North Bay]" and the duty of fair representation: "A union *must* discharge its duty *both in bargaining* with the employer *and* in its *enforcement of the resulting collective bargaining agreement*. *Terry*, 110 S. Ct. at 1344 (emphasis added). The statute is thus "implicated." 7a.

arising thereunder" of a term and condition of employment under § 8(d).[7]

Of course, a union security provision cannot compel an employee to sign up for the check-off, but it can compel the worker to choose otherwise to pay the union directly. *Metal Workers' Alliance, Inc.*, 172 N.L.R.B. 815, 817 (1968). But, the matter of union security is, as the court of appeals admits, a mandatory subject of bargaining. 4-5a. Once found to be bargainable, then the entire matter is open to negotiation. Furthermore, this Court in *General Motors*, 373 U.S. at 743, stated that a union "proposal for requiring the payment of dues and fees" was "a proposal for an agreement within the proviso to § 8(a)(3)" and therefore within the employer's duty to bargain. *Id.* at 745.

The court of appeals' further discussion of *Communication Workers v. Beck*, 5a, will have a devastating effect on the interpretation of § 8(a)(3) and is not convincing as a statement of federal labor policy for several reasons. First, the court of appeals contends that holding the amount of fees to be collected from non-union employees as a mandatory subject of bargaining is not compelled because the suit in *Beck* resolved a dispute between the union and objecting employees. Second, it contends *Beck* "has no bearing on this case" as the Court gave no indication that an employer has a role in addressing the agency fee because to do so might present the employer an opportunity to affect the union's representational expenditures.

The court of appeals has simply refused to acknowledge that the holding of this Court in *Beck* and the express language used therein, is that not only is the duty of fair representation violated

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[7] The topic of agency fees is plainly an "aspect"of a mandatory subject and "relevant"to a mandatory subject. *Local 13*, 598 F.2d at 270. North Bay's interest is also "rooted in...data requested in order to properly administer and police a collective bargaining agreement." *Oil, Chem. & Atomic Workers v. NLRB*, 711 F.2d 348, 358 (D.C. Cir. 1983).

when a union "exacts" money in excess of germane collective bargaining expenses, 108 S. Ct. at 2656, but the statute, "§ 8(a)(3)...authoriz[es] the collection of only those fees necessary to finance collective bargaining." 108 S. Ct. at 2655, 2657. Since Section 8(a)(3) is an employer violation of the Act, Petitioner reads § 8(a)(3) as prohibiting it from agreeing (or conspiring) with the union to violate the Act. Petitioner properly raised this issue at the bargaining table with the union, and informed the union that it would not permit itself to be used as a conduit for violating the law by the union (since the union had no rebate procedure). The union agreed "to make and develop language . . . concerning the amount of Agency fee," 13a, thereby waiving any concern that doing so would impair union representation.

In fact, the activities for which compulsory unionism is permitted to defray expenses again are those found in § 8 (d) of the NLRA. The *Beck* Court repeatedly emphasized the requisite nexus between collective bargaining and the costs chargeable under the statute:

> The statutory question presented in this case, then, is whether [§ 8 (a)(3)] includes the **obligation to support** union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment. We think it does not.[8]

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[8] *Beck*, 108 S. Ct. at 2648 (emphasis added.).

> We conclude that § 8(a)(3) . . . authorizes the exaction of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'"[9]

Beck also makes clear that the Court determined the validity of the language of collective bargaining agreements, and was not merely issuing some proclamation of abstract rights: "We granted certiorari to resolve the important question concerning the validity of such agreements."[10] And the Court made clear that provisions which exceed the *Beck* limitations cannot be negotiated:

> Although we have never before delineated the precise limits § 8(a)(3) places on the *negotiation* and enforcement of [compulsory unionism] agreements, the question the parties proffer is not a new one.[11]

> Obviously [Commenting on *Teamsters Local 959*, 167 N.L.R.B. 1042, 1045 (1967)], once the Board determined that the dues were not used for collective bargaining purposes, the conclusion that they were not dues within the meaning of § 8(a)(3) followed automatically.[12]

The Court also emphasized repeatedly that fees which exceed those permitted by *Beck* cannot be collected:

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[9] *Beck*, 108 S. Ct. at 2657.

[10] *Beck*, 108 S. Ct. at 2646.

[11] *Beck*, 108 S. Ct. at 2648 (emphasis added).

[12] *Beck*, 108 S. Ct. at 2652.

> [P]etitioners contend that § 8(a)(3) cannot plausibly be read to prohibit the collection of fees in excess of those necessary to cover the costs of collective bargaining. *We find this argument unpersuasive*. . . .[13]
>
> It simply does not follow . . . that Congress left unions free to exact dues equivalents from nonmembers in any amount they please, no matter how unrelated those fees may be to collective bargaining activities.[14]
>
> Congress understood § 8 (a)(3) to afford nonmembers adequate protection **by authorizing the collection of only those fees necessary to finance collective bargaining activities**: because the amount of such fees would be fixed by their underlying purpose.[15]
>
> [T]he rationale underlying § 8 (a)(3) [is]: prohibiting the collection of fees that are not germane to representational activities [i.e., collective bargaining, contract administration and grievance adjustment].[16]

Moreover, the collective bargaining agreement at issue in the instant case, Article VI, Subsection A, limited payment of service fees to the union in amounts which "shall not exceed that amount as outlined or required by the pertinent case law." 13a; J.A. 151. Consequently, North Bay was bound both by contract to "deduct...service fees...from the salaries of unit members," J.A. 152 (Article VI, D, 1), and by longstanding law of the Ninth Circuit

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[13] *Beck*, 108 S. Ct. at 2653 (emphasis added).

[14] *Beck*, 108 S. Ct. at 2655.

[15] *Id.* (emphasis added).

[16] *Beck*, 108 S. Ct. 2656 (The Court had so defined "representational activities," at 2645.)

not to collect more agency shop fees than authorized under that Circuit's NLRA caselaw.[17]

Finally, allowing the parties to voluntarily determine an agency fee will not undermine collective bargaining. The union will always remain free not to agree with the employer to jointly establish a fee. Petitioner here is not at all attempting to "assert" the rights of its employees, but attempting to ensure that it does not violate § 8(a)(3) in implementing a union security clause concerning non-union workers, a reality occurring ever more frequently. *Cf. Jordon v. City of Bucyrus, Ohio*, 739 F. Supp. 1124 (N.D. Ohio 1990); *Mitchell v. Los Angeles Unified School Dist.*, 739 F. Supp. 511 (C.D. Ca. 1990)(employer shared with the union the duty to ensure fair procedures utilized); *Price v. International Union, UAW*, 487 U.S. 1229 (1988), *vacating* 795 F.2d 1128 (2d Cir. 1986), *aff'g* 621 F. Supp. 1243 (D. Conn. 1985), on remand, 722 F. Supp. 933 (D. Conn. 1989), *appeal docketed* No. 90-7652 (2d Cir. July 23, 1990) (issue of employer liability presented).[18]

As an employer, North Bay is attempting to solely protect its own interests under the law and has not asserted that it is

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[17]The court below completely failed to apply Ninth Circuit precedent in *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996 (9th Cir. 1970), that has for twenty years limited the reach of the union dues obligation of a non-union worker arising in union security clauses in collective bargaining agreements in California, as "an implied term of the contract,"to "authorized"purposes, as dispositive here. *See Ferens v. John Deere Co.*, 110 S. Ct. 1274, 1280 (1990)(applying the law of the transferor forum to new forum when there is a change of venue). The defendants in *Seay* were both the employer and the union.

[18]An employer has several legitimate collective bargaining and business concerns to which union security may affect its economic interests, including, an uncoercive workplace for prospective professional employees and current employees. J.A. 140. The present record leaves the worker with three options, pay the full equivalent of union dues, quit, or refuse to pay the full dues equivalence and be fired. The latter two options deprive the employer of the services and investment made in that employee.

representing employee interests, especially where the employees have their own counsel and have pursued actions concerning the interpretation of the instant union security clause made by the Board. 28a. *See Karen Leslie Fuller v. NLRB*, No. 89-1269 (D.C. Cir. 1989). Clearly, a hybrid breach of contract/duty of fair representation claim by individual employees looms over an employer who fails to enforce the terms of a contract.

The instant case is therefore about the union's duty to produce information relevant to provisions of a contract it has signed. The case is not about what employees armed with that information would do in the exercise of their rights under the Act.

For these reasons, the short form Board decision enforced by the court of appeals has far reaching implications for: (a) the duty of parties to provide information relevant to the enforcement of a written collective bargaining contract;[19] (b) the proper scope of an agency shop clause under § 8(a)(3) of the Act, where the interests of nonmember employees may be antagonistic to the union that is their § 9(a) statutory representative; (c) the authority of the ALJ to ignore precedent of the applicable Circuit; and the ability of the NLRB to pursue cases in the Circuit Court in the face of subsequent adverse Supreme Court decisions. Each of these interests present a significant issue which affects employers nationwide.

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[19] It is, of course, impossible to know whether without the language agreed upon there would be any contract at all or any "union security"clause at all. The result of the Board's decision and the panel's decision has effected a forbidden rewriting of the parties contract where no illegality in the employer's demand justifying a rewrite has been shown. *H.K. Porter v. NLRB*, 397 U.S. 99 (1970).

II. THE DUTY OF THE UNION TO SUPPLY INFORMATION TO THE EMPLOYER IS COEXTENSIVE WITH THE DUTIES SET OUT IN SECTION 8(d) OF THE ACT OR ESTABLISHED BY CONTRACT

The court of appeal's limited response to the central argument of Petitioner that the union's refusal to supply it with information pursuant to the express terms of the collective-bargaining agreement and for purposes of negotiation and later arbitration, was to conclude that this "does not become mandatory solely by reason of the parties' agreement to bargain over it or to submit it to arbitration." 6a. The Court suggests that a nonmandatory subject of bargaining cannot be converted into a mandatory subject and neither may an agreement to arbitrate "confer[] an independent right to information regarding that subject." 6a.

It is abundantly clear that a union is likewise required to respond to an employer's request for information necessary to address relevant "issues about which the parties are obligated to bargain." This case represents a tremendous step backward for collective bargaining nationwide. In *NLRB v. Insurance Agents' Union*, 361 U.S. 470, 477 (1960), this Court stated that " § 8(b)(3), [is] the counterpart of § 8(a)(5)." Consequently, in *Local 13, Detroit Newspaper Printing & Graphic Communications Union v. NLRB*, 598 F.2d 267, 270 (D.C. Cir. 1979), the court below affirmed that the union's duty to provide information is akin to the employer's duty to supply information. That duty not only encompasses information necessary to perform its bargaining obligation under the Act, but also to "negotiate effectively." *Westinghouse Elec. Corp.*, 239 N.L.R.B. 106, 107 (1978)("The fact that the information is of probable or potential relevance is sufficient to give rise to an obligation...to provide it."). The duty also corresponds to the civil discovery standard and is a "liberal one," *Local 13,*. at 271. "[A]ny less rule in labor disputes would hamper the bargaining process." *Id.* at 272.

The court of appeals, however, affirms a surprising new exception to this rule of production, that the amount of the agency fee is a non-mandatory subject of bargaining because of its view that agency fees do not affect the relationship between employer and employee, but only between employee and union. Being designated a nonmandatory subject of bargaining, the court accepts the Board's contention that the union in this case could lawfully refuse to supply sufficient information, to set an agency fee, to Petitioner North Bay. 6a.

In discerning whether or not a matter fits within the meaning of "terms and conditions of employment," this Court always has looked to the statute's plain meaning and also whether it will serve the interests of the Act. *Fibreboard Corp. v. NLRB*, 379 U.S. 204, 210 (1964)("contracting out" found to be an expansion of previously held interpretations of § 8(d), but "is well within the literal meaning of the phrase 'terms and conditions of employment.' ").[20] As Petitioner now shows, the issue involved here serves both purposes.

The court of appeals fundamentally confuses the analysis when it attempts to disprove that the payment of fees to the union by the employer, from the wages of an employee, are not an aspect of bargaining. At best, the court only can suggest general principles that agency fees encompass only employee and union concerns. Because North Bay's request for information was grounded in express contractual language, the court's complete surrender of discretion to the Board in the circumstances of this case, undermines its entire argument. 6a.

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[20]In *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 679 n.18 (1981), the Court noted that "[t]he subjects over which mandatory bargaining has been required have changed over time." If that statement is true, then "the conditions of employment" language in § 8(d) does not immutably fix a set of subjects or "establish a limitation against which proposed topics must be measured." *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971). The Court may take judicial notice that historically, the list of mandatory subjects has grown larger, not smaller.

In *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979), the Court was confronted with the question "whether prices for in-plant cafeteria and vending food and beverages are 'terms and conditions of employment' subject to mandatory collective bargaining under §§ 8(a)(5) and 8(d) of the National Labor Relations Act." 441 U.S. at 490. The Court ruled that Ford was obligated to bargain about the price of the food services "and other aspects of this service" as "conditions of employment" over which "one need not strain to consider" as such. *Id.* at 498.

The Court reasoned that "[i]ncluding within § 8(d) the prices of in-plant food and beverages" would serve the ends of the NLRA, because "local agreements between Ford and the Union have contained detailed provisions about nonprice aspects of in-plant food services for several years." 441 U.S. at 500. The Court reached this conclusion noting that the subject was "plainly germane to the 'working environment'," *quoting Fibreboard*, 379 U.S. 203, 222 (Stewart, J., concurring), and disregarding that the employer was not in the business of selling food. 441 U.S. at 498.

Ford Motor Co. argued, in much the same manner as the court and the Board have done here, that the matter of food pricing was not a mandatory subject of bargaining and does not affect the employment relationship. This Court explained that, "[h]ere, however, the matter of in-plant food prices and services is an aspect of the relationship between Ford and its own employees." *Id.* And in the instant case, the payment of fees by non-union workers, out of wages which would otherwise be paid to them by their employer, similarly is an "aspect" of the employment relationship North Bay has with its workers, inasmuch as it only occurs because of an agreement with the employees' certified representative and North Bay (not involving the employees directly).[21]

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[21] In *Breininger v. Sheet Metal Workers Int'l* 110 S. Ct. 424, 437 (1990), the Court ruled that the breath of the union's duty of fair representation is coextensive with representative status: "Only because of its status as a Board-certified bargaining representative and by virtue of the power granted to it by the

The determinative aspect of the case, then, was the fact that Ford Motor Company had bargained over the provision of food services in its prior collective-bargaining agreements and had a corresponding duty to provide relevant information to the union concerning that topic:

> The National Labor Relations Board's order at issue here directed petitioner to bargaining with respondent Union "with respect to food services and changes in food prices in [petitioner's in-plant] vending machines and cafeteria..." *Ford Motor Co. (Chicago Stamping Plant)*, 230 N.L.R.B. 716, 719 (1977), *enf'd*, 571 F.2d 993 (CA7 1978). The duty to bargain over nonprice aspects of in-plant food services is thus also at issue here. **The Board's order also obligated petitioner to supply respondent Union with the information necessary for bargaining.** 230 N.L.R.B., at 719. It seems agreed that if food prices and service are mandatory bargaining subjects, the order to furnish information should stand. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303, 99 S.Ct. 1123, 1125, 59 L.Ed.2d 333 (1979).

Ford Motor Co., 441 U.S. at 490 n.1 (emphasis added).

The court of appeals failed to recognize that the duty to bargain is not tied to a strait jacket interpretation. Although overlooking this Court's conclusion that the collective bargaining agreements are critically important in determining the mandatory nature of the subject bargained for, the court of appeals did

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collective-bargaining agreement...comes the responsibility to exercise it in a nonarbitrary and nondiscriminatory fashion...The key is that the union is administering a provision of the contract, something that we have always held is subject to the duty of fair representation. 'The undoubted broad authority of the union as exclusive bargaining agent in the negotiation *and administration* of a collective bargaining contract is accompanied by a responsibility of equal scope, the responsibility and duty of fair representation.' "(*quoting Humphrey v. Moore*, 375 U.S. 335, 342 (1964)(emphasis in original).

recognize that the decision in *Ford Motor Co.* demonstrates that agreements to negotiate over certain topics may be instructive in concluding that a new "trend of industrial practice" may exist. 7a. However, the court below refused to acknowledge that both the statute and the state of the law creates the duty to supply information. *Shearson v. McMahon*, 482 U.S. 268, 107 S. Ct. 2332, 2359 (1987) (Stevens, J. concurring) ("But after a statute has been construed by this Court...it acquires a meaning that should be as clear as if the judicial gloss had been drafted by the Congress itself.").[22]

Because Petitioner North Bay and the union had an express agreement to negotiate over the agency shop fee and to terminate any dispute in arbitration, the matter should have become a mandatory subject of bargaining between these two parties, and the Board, as in *Ford Motor Co.*, should have ordered the union to supply the requested information and bargain over the amount ("price") of the proposed agency fee. Here, the court of appeals "failed to give the plain language of the standard [of § 8(d)] its ordinary meaning." 441 U.S. at 497, (*citing to*, *Pittsburgh Plate Glass Co.*, 404 U.S. at 166).[23]

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[22]The Board's reasoning turns up as a manifestation of its former decision in *Detroit Mailers Union No. 40*, 192 N.L.R.B. 951 (1971), which this Court in *Beck*, 108 S. Ct. at 2652 n.7, had proved to be wrong.

[23]The instant case is therefore completely distinguishable from *Pittsburgh Plate Glass*, 404 U.S. 157 (1971), where the employer changed the health benefits of retired workers and where this Court determined in that context that retired workers were not "employees"within the meaning of the Act. Therefore, the unilateral modification of the contract by the employer in *Pittsburgh Plate Glass* was not a violation of the duty to bargain under § 8(d) because matters concerning retirees were permissive subjects. The case is inapposite because the agency fees at issue in the instant case concern present workers and union security is admitted by the Board and the court of appeals to be a mandatory subject of bargaining, 4a, in which the amount of the fee is the most vital "aspect"of that subject. "No third-party interest is directly implicated, and the standard of *Pittsburgh Plate Glass* has no application." *Ford Motor Co.*, 441 U.S. at 501.

Furthermore, this Court has taken an emphatic role in supporting document requests in the context of collective bargaining and in preparation for arbitration. Thus, in *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979), the Court determined that under § 8(a)(5), the duty to bargain "includes a duty to provide relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining representative." In *NLRB v. Acme Indus. Co.*, 385 U.S. 32 (1967), the Court was confronted with the issue whether the Board's jurisdiction had to await the outcome of arbitration proceedings. The Board found the documents to be relevant and this Court concluded that "this liberal discovery-type standard" aided the arbitration process. *Id.* at 437.[24]

> Arbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims. For if all claims originally initiated as grievances had to be processed through to arbitration, the system

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As the Court will also note, one such employee of Petitioner, Karen Leslie Fuller, attempted to intervene before the Board in this case, 28a, filed her own petition for review involving the instant matter, Case No. 89-1269 (D.C. Cir.), and attempted unsuccessfully to file a brief *amicus curiae* below. Clearly, the union's refusal to negotiate with Petitioner North Bay is creating numerous ongoing disputes in the bargaining unit. "[I]t follows, that more, not less, collective bargaining is the remedy." *Ford Motor Co.*, 441 U.S. at 502.

[24]The Board has also recognized in numerous cases that if the information sought by a party has a reasonable or probable relevance to a contract breach, it must be produced. *Realty Maintenance, Inc.*, 265 N.L.R.B. 1352 (1982), *enf'd*, 723 F.2d 746, 747 (9th Cir. 1984)(liberal discovery-type standard applies even to "matters beyond the more traditional request for data"); *Washington Gas Light Co.*, 273 N.L.R.B. No. 20 (1984)(confidential records must be submitted where never claimed prior to request); *ASARCO, Inc., Tennessee Mines Div. v. NLRB*, 805 F.2d 194 (6th Cir. 1986)(matter disclosable to union enforced based upon collective bargaining agreement); *Nielson Lithographing Co.*, 279 N.L.R.B. No. 118 (1986)(employer violated the Act by refusing to provide union with information concerning a unilateral change in working conditions).

> would be woefully overburdened. Yet, that is precisely what the respondent's restrictive view would require. It would force the union to take a grievance all the way through to arbitration without providing the opportunity to evaluate the merits of the claim.

Acme, 385 U.S. at 438.

Under these circumstances, if the Board will no longer enforce production of document requests involving extant bargaining subjects and obligations, then a new wrench has been thrown into collective bargaining that will cause uncertainty to develop in other areas involving the duty to bargain over "wages, hours, and other terms and conditions of employment." Consistent with *Acme*, the Board should have enforced North Bay's request for information in furtherance of the arbitration process.

CONCLUSION

As demonstrated above, this case presents a solid record upon which this Court may decide the twin important questions presented. Due to the manner in which issues arise and are formulated by the Board, the questions under § 8(a)(3) and § 8(d) offered here will never again be presented to a court for review, because the Board's General Counsel will be precluded from doing so.

WHEREFORE, Petitioner respectfully requests that the Court issue a writ of certiorari to the District of Columbia Circuit to review these important questions central to the administration of the National Labor Relations Act.

Respectfully submitted,

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October 5, 1990

CONCLUSION

[illegible] decisions among the [illegible] presents a split in the circuits upon which this Court may decide the [illegible] questions presented. Due to the manner in which [illegible] and by the Board, the questions under § 8(a)(1) [illegible] arise again be presented to a [illegible] review, because the Board's General Counsel will be [illegible] Court along [illegible].

WHEREFORE, Petitioner respectfully requests that [illegible] a writ of certiorari to the Eleventh Circuit to review these important questions concerning the administration of the National Labor Relations Act.

Respectfully submitted,

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October 5, 1990

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-1467

Argued May 15, 1990 Decided June 15, 1990

NORTH BAY DEVELOPMENT DISABILITIES SERVICES, INC. D/B/A NORTH BAY REGIONAL CENTER, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

Petition for Review of an Order of the National Labor Relations Board

Michael E. Avakian for petitioner.

Margaret G. Bezou, Attorney, National Labor Relations Board, with whom *Robert E. Allen*, Associate General Counsel, *Aileen A. Armstrong*, Deputy Associate General Counsel, and *Peter Winkler*, Attorney, NLRB, were on the brief for respondent.

Before Ruth B. Ginsburg, D. H. Ginsburg, and Sentelle, *Circuit Judges*. Opinion for the Court filed by Circuit Judge D. H. Ginsburg.

D. H. GINSBURG, *Circuit Judge*: The National Labor Relations Board held that a union does not commit an unfair labor practice when it declines an employer's demand for information about the union's finances in the course of bargaining over the amount of the agency fee that non-union employees will have to pay to the union. The Board held that the amount of an agency fee is not a mandatory subject of bargaining and does not become so by virtue of a union and an employer's agreement to negotiate over it, and that therefore, a union's refusal to provide information relevant to that issue does not implicate the NLRA. *Social Servs. Union, Local 535*, 287 NLRB No. 129 (1988). We

find that there is sufficient support for the Board's decision, and accordingly, deny the employer's petition for review.

I. FACTS

The Social Services Union, Local 535, and the Employer, petitioner North Bay Development Disabilities Services, Inc., entered into a collective bargaining agreement (CBA) containing an agency shop clause that required each employee either to join the Union or to pay it an agency fee not in excess of that allowed by "the pertinent case law." The CBA also required the parties to negotiate over "the amount of Agency fee to be paid" and provided that if agreement were not reached by a specified date (long since passed) "the issue shall be submitted to an arbitrator."

In the ensuing negotiations, the Employer proposed that the agency fee be set at 20% of the periodic dues paid by Union members. The Employer also requested that, in the event that the Union did not agree to the 20% figure, it provide the Employer with "a detailed breakdown of all revenues and expenditures" of both the Local and the International for the current and the prior three years. The Employer maintained that this information was necessary in order for it and the Union jointly to determine what percentage of the members' dues are spent on representation, and thus the maximum that non-members could be charged for the Union's services.

When the Union refused to supply the information, the Employer invoked the arbitration clause of the CBA. The Employer has since adhered to its demand for the information on the ground that it is necessary to the presentation of its case before the arbitrator. The Employer also filed an unfair labor practice charge with the Board, alleging that the Union's refusal to provide the requested information constituted a refusal to bargain in good faith, in violation of § 8(b)(3), 29 U.S.C. § 158(b)(3). The Regional Director of the NLRB issued a complaint, an ALJ ruled that the Union had not violated § 8(b)(3), and the Board (insofar as is relevant here) "affirm[ed]

the judge's rulings, findings, and conclusions and . . . adopt[ed] the recommended Order." In so doing, the Board explained

> that the amount of agency fees [sic] is a nonmandatory subject of bargaining and that it is not transformed into a mandatory subject by virtue of the parties' agreement to bargain concerning it. Inasmuch as the duty to provide information is coextensive with the statutory duty to bargain concerning mandatory subjects, [the Union] had no duty to provide information requested here.

287 NLRB at 129 n.1.

The Employer petitions for review. It argues that the Board erred insofar as it held that the amount of an agency fee is not a mandatory subject of bargaining, and that even if the amount of such a fee is only a permissive subject of bargaining, the Employer is entitled to the information it requested if it is relevant "to bargaining, to the contract or to the parties' pending arbitration."

II. ANALYSIS

Whether a matter is within the realm of "terms and conditions of employment," NLRA § 8(d), 29 U.S.C. § 158(d), and is therefore a mandatory subject of bargaining, "is a matter concerning which the Board has special expertise." Our review is concomitantly narrow. We will uphold the Board's decision as long as it is "reasonably defensible." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495-97 (1979); *see Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-45 (1984) ("if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute"). We will disturb the Board's determination only if its factual findings are not supported by substantial evidence or it has "acted arbitrarily or otherwise erred in applying established law to the facts at issue." *United Food & Commercial*

Workers Int'l Union, Local 150-A v. NLRB, 880 F.2d 1422, 1428-29 (D.C. Cir. 1989).

Here we find no basis for overturning the Board's conclusion that the amount of an agency fee is not a mandatory subject of bargaining. The Board reasonably construed the obligation to bargain in light of the limitation found in the proviso to § 8(b)(1)(A), which protects "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." That proviso has previously led the Board to the position that "the fees [that a union] imposes are subject to the scrutiny of the Board only in limited situations," *Metal Workers' Alliance, Inc.*, 172 NLRB 815, 816 (1968). The ALJ aptly described such situations as those in which the union's "enforcement [of a fee requirement] affects employment status," and this is not a case of that character.

The line between the internal affairs of a union, shielded from Board regulation by § 8(b)(1)(A), and the "terms and conditions of employment," as to which the Board enforces the obligation to bargain, is not always clear. *U.O.P. Norplex, Div. of Universal Oil Prods. Co. v. NLRB*, 445 F.2d 155, 157 (7th Cir. 1971) (withdrawal of fines union imposed upon non-strikers not a mandatory subject because it "primarily involv[es] the relations between the employee and his union, although [it is] of some interest to the employer"). It is clear enough, however, that the amount of an agency fee concerns primarily the relationship between the union and the non-member employees; it is not "an aspect of the relationship between the employer and employees," which strongly suggests that it is not a mandatory subject of bargaining between a union and an employer. *Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971) (*citing NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958)). It is for this reason that the mandatory character of the more general issue of union security (i.e., whether employees will have either to join the union or to pay an agency fee), *see NLRB v. General Motors Corp.*, 373 U.S.

734, 743-45 (1963), does not compel the conclusion that the amount of the agency fee is also a mandatory subject.

Contrary to the Employer's argument, the Supreme Court's decision in *Communications Workers v. Beck*, 487 U.S. 735 (1988), does not compel the Board to a different result. The Court there held that, under the NLRA, a worker who chooses not to join a union cannot be required to pay to the union more than is necessary "to support union activities . . . germane to collective bargaining, contract administration, and grievance adjustment." *Id.* at 745. The Court's decision has no direct bearing on this case, however, because it arose from a dispute between an employee and a union over the amount of the agency fee, and did not raise the issue of whether that amount is a subject of mandatory bargaining between a union and an employer. The inference that we draw from Beck, moreover, supports the Board's position: because an agency fee must be based upon a union's representational expenses, it does not make sense to force a union to bargain with an employer over the amount of the fee, lest the resulting figure reflect the parties' relative bargaining strengths rather than the amount chargeable by some objective standard - presumably one based, like a public utility rate-making decision, upon experience in the recent past. *See, e.g., Price v. International Union, UAW*, 722 F. Supp. 933, 937-42 (D. Conn. 1989) (upholding union's method of calculating chargeable fees based upon major categories of expenditures in its financial statements, which "closely track[ed] guidelines established in a recent internal NLRB memorandum (Memorandum GC 88-14, Guidelines Concerning *CWA v. Beck*, NLRB Office of the General Counsel, Nov. 15, 1988")). Indeed, the practical effect of such enforced bargaining could well be to require a union to negotiate with an employer the amount that it will devote to representation of employees in the future, i.e., during the term of the contract, which is surely an internal union matter of no proper concern to the employer.

The Employer in this case voices the concern that it might be charged with an unfair labor practice if it withholds an exces-

sive fee from an employee's paycheck, or fires an employee who does not authorize such withholding. This apprehension is at best premature and appears also to be unfounded. If an employee were to object to the amount of the fee to be withheld - a feature notably absent from this case - and were to refuse to authorize the deduction, it appears that, unless the Employer had reason to believe that the fee was unlawful, it would commit no unfair labor practice if, as required by the CBA, it dismissed the employee at the Union's request. *See H.C. Macaulay Foundry Co. v. NLRB*, 553 F.2d 1198, 1201-02 (9th Cir. 1977); *see also Helmsley-Spear, Inc.*, 275 NLRB 262, 262 n.1, 268 (1985).

The Board has not had occasion, since the decision in *Beck*, to address the means by which an employee may properly challenge the level of an agency fee. (The non-union employees in *Beck* successfully sued their union in federal court, asserting that use of their agency fees for purposes other than representation violated the union's duty of fair representation.) It is surely within the Board's discretion, however, to conclude that the appropriate mechanism is not for an employer, in bargaining with a union, to appoint itself the representative of some hypothetical non-union employees who may object to the amount of the agency fee set by the union.

Our conclusion that the Board reasonably determined that the amount of a union's agency fee is not a mandatory subject of bargaining dooms the whole of petitioner's claim. The duty to bargain imposed by the Act is limited to the mandatory subjects captured by the statutory litany of "wages, hours, and other terms and conditions of employment" in § 8(d). *See Borg-Warner*, 356 U.S. at 349. As the Board held, a subject that is not mandatory does not become mandatory solely by reason of the parties' agreement to bargain over it or to submit it to arbitration. *See Chemical Workers*, 404 U.S. at 187 ("By once bargaining and agreeing on a permissive subject, the parties, naturally, do not make the subject a mandatory topic of future bargaining.").

Of course, an agreement to negotiate about a subject, particularly if it is part of a "trend of industrial practice," may be "relevant in construing the phrase 'terms and conditions of employment,'" *Ford Motor*, 441 U.S. at 499-500; even such a trend is not decisive, however, and here we have no indication that more than a single such agreement exists. Although courts do, on occasion, refer to parties' contractual obligations when considering whether one party has committed an unfair labor practice by refusing to bargain or to submit an issue to arbitration, petitioner points to no such case involving a non-mandatory subject. Thus, it is of no moment whether the Union violated the CBA by failing, as alleged, to provide information relevant to negotiation or arbitration of the agency fee issue (a contract question upon which we, like the Board, express no opinion); the Union's refusal to provide the requested information simply does not implicate the statute. *Chemical Workers*, 404 U.S. at 176 n.17.

III. CONCLUSION

The Board was reasonable in interpreting the NLRA not to make the amount of the agency fee that a Union charges nonmembers a mandatory subject of bargaining. And since a nonmandatory subject does not become mandatory by virtue of the parties' agreement to negotiate or to arbitrate the issue, the Union did not commit an unfair labor practice by refusing to supply information relevant to that subject. The petition for review is therefore

Denied.

287 NLRB No. 129

SJB
D--5017
Napa, Solano, and
Sonoma Counties, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SOCIAL SERVICES UNION, LOCAL 535,
SERVICE EMPLOYEES INTERNATIONAL
UNION, AFL -- CIO

and Case 20--CB--7122

NORTH BAY DEVELOPMENT DISABILITIES
SERVICES, INC., d/b/a NORTH BAY
REGIONAL CENTER

DECISION AND ORDER

On 24 July 1987 Administrative Law Judge William J. Pannier III issued the attached decision. The Charging Party filed exceptions, to which it has appended the General Counsel's brief to the administrative law judge, and the Respondent filed a brief in opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the

judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. 19 February 1988

James M. Stephens, Chairman

Wilford W. Johansen, Member

Marshall B. Babson, Member

NATIONAL LABOR RELATIONS BOARD

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[1]In adopting the judge's dismissal of the complaint, we agree with his conclusion that the amount of agency fees is a nonmandatory subject of bargaining and that it is not transformed into a mandatory subject by virtue of the parties' agreement to bargain concerning it. Inasmuch as the duty to provide information is coextensive with the statutory duty to bargain concerning mandatory subjects, we agree that the Respondent had no duty to provide information requested here. We therefore find it unnecessary to pass on the additional reasons set forth by the judge for his conclusion.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

SOCIAL SERVICES UNION, LOCAL 535, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL -- CIO

and Case 20--CB--7122

NORTH BAY DEVELOPMENT DISABILITIES SERVICES, INC., d/b/a NORTH BAY REGIONAL CENTER

DECISION

Statement of the Case

WILLIAM J. PANNIER III, Administrative Law Judge: I heard this case in San Francisco, California on 6 May 1987. On 5 March 1987 the Regional Director for Region 20 of the National Labor Relations Board, herein called the Board, issued a complaint and notice of hearing, based upon an unfair labor practice charge filed on 21 January 1987, alleging a violation of Section 8(b) (3) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, herein called the Act. All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine the lone witness called to testify, and to file briefs. Based upon the entire record, upon the oral arguments and brief filed on behalf of the General Counsel, and upon my observation of the demeanor of the witness, I make the following findings of fact and conclusions of law.

I. Jurisdiction

At all times material, North Bay Development Disabilities Services, Inc., d/b/a North Bay Regional Center, herein called the Employer, has been a non-profit California corporation, with offices and places of business in Napa, Solano and Sonoma Counties in the State of California, and has been engaged in providing and obtaining services for developmentally disabled persons. In the course and conduct of those business operations during calendar year 1986, the Employer received funds in excess of $ 1million from the State of California which, in turn, is directly engaged in interstate commerce. Therefore, I conclude, as admitted in the answer, that at all times material, the Employer has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

At all times material, Social Services Union, Local 535, Service Employees International Union, AFL-CIO, herein called Respondent, has been a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practice

A. Issue

As presented in the complaint, this case involves no more than an issue concerning the duty to supply information that is requested to implement the terms of a collective-bargaining contract. But in his brief, Counsel for the General Counsel concedes that the contractual subject underlying the request is, "the parties' agreement to determine the amount of the agency fee" -- that is, the *amount* that must be paid, in lieu of periodic dues and initiation fees, by employees who choose not to become members of Respondent, even though they desire to continue working for the Employer in the bargaining unit represented by Respondent.

As discussed more fully *post*, to violate the Act a refusal to supply information must, *inter alia*, pertain to a bargaining subject categorized as a mandatory one. Parties' agreements concerning subjects that are not mandatory cannot be enforced by the Board under the Act. Amounts of agency fees, like amounts of periodic dues and initiation fees established by labor organizations, are not mandatory subjects of bargaining. Therefore, I conclude that Respondent did not violate the Act when it refused to provide information to implement "the parties' agreement to determine the *amount* of the agency fee" for the union security provision of their contract.

B. Facts

On 6 October 1986, Respondent and the Employer executed a collective-bargaining contract, covering a unit of professional and full- and part-time employees,[1] effective "until terminated in its entirety at midnight of September 30, 1988, or until expiration of the Employer's principal operating agreement with the State of California, whichever is earlier." For purposes of this proceeding, the significant portion of that contract is Article VI, Subsection A, which reads:

> Agency Shop. Each employee covered by this Agreement who is hired after September 12, 1986 shall, as a condition of continued employment, within thirty (30) days of first employment at the Center, either 1)

[1]The unit description, which the parties agree is appropriate, is: All professional employees of the Employer, including physicians, psychologists, nurse specialists, nutritionist and occupational therapist, all full-time and regular part-time employees of the Employer, including Clients Rights Specialist, Community Resource Consultants, Senior and nonsenior Client Program Coordinators, Fiscal Assistants, Office Assistants, Assessment Counselors, Revenue Coordinator and CDER/Vendor Coordinator; excluding all other employees, confidential employees, managerial employees, accountant, temporary employees, guards and supervisors as defined by the Act.

become and remain a member in good standing of the Union, or 2) commence and continue to make payment(s) of an amount equal to the Union's periodic dues and initiation fees to the Union as a service fee for Union representation, except such amount shall not exceed that amount as outlined or required by the pertinent case law.

The parties agree to meet and develop language to be included in this agreement concerning the amount of Agency fee to be paid in lieu of Union dues by persons in the unit who do not belong to the Union. The parties agree to be bound by the relevant U.S. Supreme Court Decisions on the subject. Such discussions shall be held during the months of November and December, 1986 and resolution shall be attained by December 31, 1986 or the issue shall be submitted to an arbitrator from a panel supplied by the American Arbitration Association (AAA).

Minimal evidence was adduced concerning the bargaining history that led to agreement on this provision.[2] However, it is clear that the Employer was concerned with confining the agency fee to no more than an amount needed by Respondent for purposes of collective bargaining, contract administration and grievance adjustment. That approach is not a novel one. Under the Railway Labor Act and in the public employment sector, it is possible for nonmembers to preclude expenditure of monies

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[2]The Employer's negotiator agreed that, during negotiations, Respondent had sought "a total Union shop" and the Employer had wanted "an open shop." He further testified that, "I don't really recall which one uh, first uh, raised the issue of uh, the elements that are currently in our Article 6, but there were some intermediate positions and I believe this was a counter position offered by the Union," and that Respondent's negotiator had "suggested that we use in this particular case the Triple A because they would have people who would have been given special training in this area."

derived from their agency fees for items that are not, "necessary or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435, 448 (1984). See also, *Machinists v. Street*, 367 U.S. 740 (1961) and *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977).

No similar restriction exists for nonmembers employed by employers subject to the Act. But the Supreme Court recently granted certiorari in a case presenting that issue. *Communications Workers of America v. Beck*, No. 86-637, __ U.S. __, 107 S. Ct. 2480 (June 1, 1987). However, the Employer's negotiator testified that regardless of the conclusion ultimately reached by the Court, negotiation of the agency fee amount was not contingent exclusively upon its decision in that or other cases: "I still would see an obligation on behalf of the parties to meet and develop language to be included in the agreement, that's the main thing." Nevertheless, he did contemplate that whatever agency fee amount was negotiated would be pegged to Respondent's bargaining-representative type expenditures. Thus, in a letter dated 29 November 1986, he proposed that the agency fee be set in an amount equal to twenty percent of Respondent's periodic dues, explaining:

> Admittedly, the above percentage (20%) is just an estimate of the appropriate proportion of membership dues which is alloted by Local 535 for direct representational purposes. I am confident that through a full disclosure of your revenues and expenditures, we will jointly be able to identify the correct percentage, if twenty percent proves incorrect.

That same letter contained the request for information that has led to the complaint:

If the above suggested language or percentage amount is unacceptable, we request the following data be provided as soon as possible:

1. A detailed breakdown of all revenues and expenditures of Local 535 for the most recent period and the previous three years,

2. A detailed breakdown of all revenues and expenditures of the Service Employees International Union for the most recent three fiscal years, and

3. Any other documents which you feel to be relevant to the process of defining the appropriate amount of the Agency fee to be paid by non-members in the NBRC unit.

Respondent has flatly refused to provide that information. In his letter dated 8 January 1987, Respondent's Senior Field Representative stated,

> we are currently in full compliance with relevant U.S. Supreme Court decisions on this subject. We note that the U.S. Supreme Court has not reached any relevant decisions on this subject which would bind either of the parties to a collective agreement covered by the Labor Management Relations Act, as amended. Where the Court has considered similar issues the employers and the employees were not covered by the Act but rather were covered by other legislation, e.g., local public sector laws. These decisions are neither relevant nor binding on the parties here.
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> * * * * *
>
> In the event that the Supreme Court decides on the issue of agency shops under the Act, we will of course comply with any relevant requirements outlined

> therein. We should note, however, that the decisions reached by the Court in the public sector do not require that the Union provide such financial information to an employer. The issue of what is an appropriate service fee (in the public sector) is an issue of discussion between the Union and the individual employees who choose to pay service fees in lieu of dues. As we're sure you're aware, the Court has outlined a procedure by which employees can contest the service fee amount established by the Union. This is not, therefore, an issue of appropriate discussion between the Union and the Agency.

The final link in the chain of this scenario was forged on 19 January 1987 when the Employer's negotiator sent a letter to the Regional Director of the American Arbitration Association. Renewing the theme of an agency fee amount pegged to Respondent's expenditures for "direct representational purposes," the letter requested "a panel of arbitrators" who would be "experienced with *Hudson, et al-* type cases . . . ."[3]

C. Analysis

As a general proposition, parties to collective bargaining must disclose information, when requested, that would enable other parties to meaningfully participate in the bargaining process. "There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties." (Citation omitted.) *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1976). Similarly, the obligation imposed upon the bargaining representative, "parallels [the] employer's duty to

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[3] *Chicago Teachers Union, Local No. 1 v. Hudson*, __ U.S. __, 106 S. Ct. 1066 (1986), posing the question of whether the procedures adopted by the petitioner, in that case, adequately protected the basic right enunciated in *Abood v. Detroit Bd. of Education, supra.*

bargain collectively" with the result that the bargaining representative is, "likewise obliged to furnish the employer with relevant information." (Citations omitted.) *Local 13 Detroit Newspaper v. NLRB*, 598 F.2d 267, 270-271 (D.C. Cir. 1979).

However, to say simply that information is needed for bargaining, or to implement contractual provisions, does not necessarily establish that the Act compels its production. The obligation to provide information is not open-ended and without limitation. One such limitation arises from the type of bargaining subject to which the request for information pertains. When the request pertains to a subject that is nonmandatory -- one that does not involve "wages, hours, and other terms and conditions of employment" within the meaning of Section 8(d) of the Act, *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 348-349 (1958) -- then neither employers nor labor organizations are obliged under the Act to furnish "information requested for bargaining on [that] subject." *American Stores Packing Company, A Division of Acme Markets, Inc.*, 277 NLRB No. 190, slip op. at 9 (January 14, 1986).[4] For "the duty to furnish . . . information stems from the underlying statutory duty imposed on employers and unions to bargain in good faith with respect to mandatory subjects of bargaining. *Cowles Communications, Inc.*, 172 NLRB 1909, 1909 (1968).

Parties do not have the power to alter this result merely by reaching agreement on the terms of a nonmandatory subject. To permit them to do so would be to allow them to, in effect, rewrite Section 8(d) of the Act to expand its definition of the subjects that Congress made mandatory. Yet, "Congress determined that the Board should not have general jurisdiction over all alleged violations of collective bargaining agreements. . . ." (Footnote omitted.) *NLRB v. C & C Plywood Corp.*, 385 U.S. 421,

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[4]Accord: *UOP Inc.*, 272 NLRB 999, 1069, 1070 (1985); *Local 777, Democratic U. Organizing Com. v. NLRB*, 603 F.2d 862, 888, fn. 69 (D.C. Cir. 1978); *NLRB v. Gibraltar Industries, Inc.*, 653 F.2d 1091, 1097 (6th Cir. 1981).

427 (1967). "By once bargaining and agreeing to a permissive subject, the parties, naturally, do not make the subject a mandatory topic of future bargaining." *Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass, Chemical Division*, 404 U.S. 1257, 187 (1971). As a result, it is not "an unfair labor practice for [a party] unilaterally to make a change in a permissive, nonmandatory subject of bargaining." *Finger Lakes Plumbing & Heating Co.*, 254 NLRB 1399, 1399 (1981).[5]

Inasmuch as a statutory bargaining obligation cannot be created merely because Respondent and the Employer have agreed to bargain about a nonmandatory subject,[6] the threshold issue in this case is whether or not the amount of an agency fee is a mandatory subject of bargaining. Of course, union security generally is a mandatory subject. See, e.g., *NLRB v. Andrew Jergens Co.*, 175 F.2d 130, 133 (9th Cir. 1949), cert. denied 338 U.S. 827. But that does not open the door to bargaining about all components and aspects of union security. One policy explicitly incorporated into the Act by Congress is avoidance of "outside interference in union-decision making." (Citations omitted.) *NLRB v. Financial Institution Employees of America, Local 1182*, __ U.S. __, __, 106 S.Ct. 1007, 1014 (1986). Thus,

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[5]Of course, the fact that such agreements cannot be enforced by the Board under the Act does not leave parties free to change, nor to disregard altogether, their contractual commitments concerning nonmandatory bargaining subjects. "The remedy for a unilateral mid-term modification to a permissive term lies in an action for breach of contract, . . . not in an unfair labor practice proceeding." *Ibid.*, 404 U.S. at 188.

[6]"[A] permissive subject of bargaining [does not] become mandatory [merely because] it [is] presented together with a mandatory subject," *Borden, Inc., Chemical Division Thermoplastic Products*, 279 NLRB No. 59, slip op. JD at 6-7 (April 22, 1986), and there has been no independent showing that the amount of the agency fee is "so intertwined with and inseparable from the mandatory terms and conditions for [Respondent's and the Employer's] contract . . . ." *Sea Bay Manor Home for Adults*, 253 NLRB 739, 740 (1980), enfd. 685 F.2d 425 (2nd Cir. 1982), that it has taken on the characteristics of a mandatory subject.

the proviso to Section 8(b)(1)(A) of the Act protects, "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . ." As a result, internal affairs of labor organizations are not "an aspect of the relationship between the employer and the employees," *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass, supra*, but rather, by statutory definition, are encompassed by the relationship between labor organizations and employees. It follows that subjects embraced by the internal affairs proviso are not mandatory ones. "Mandatory subjects of bargaining concern relations between the employer and the employees, not between the union and the employees." 1 C. Morris, The Developing Labor Law 858 (2nd ed. 1983).

One subject specifically regarded by Congress as an internal affair of labor organizations is that of the amounts of fees established and assessed on employees. Congress ultimately rejected a House-passed "proposal that would have regulated union procedures for . . . assessing dues . . . ., *NLRB v. Financial Inst. Employees, supra*, 106 S.Ct. at 1015, fn. 11, because, "Senate conferees . . . felt that it was unwise to authorize [the Board] to undertake such elaborate policing of the internal affairs of unions." 93 Cong. Rec. 6601 (1947), 2 Legis. Hist. 1540. Consistent with that Congressional determination, the Board has held that because of the internal affairs proviso to Section 8(b)(1)(A) of the Act, fees imposed by labor organizations "are subject to scrutiny of the Board only in limited situations." *Metal Workers' Alliance, Inc.*, 172 NLRB 815, 815-816 (1968). Consequently, as a basic proposition, fees imposed by labor organizations are part of their internal relations with employees and, concomitantly, are neither an aspect of the employer-employee relationship nor a mandatory subject of bargaining.

As the Board pointed out in *Metal Workers' Alliance*, there are limited situations where the internal affairs proviso would not shield Board scrutiny of fees imposed by labor organizations. Basically, labor organizations' internal regulations are subject to Board scrutiny whenever their enforcement affects employment

status. *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 195 (1967). But in the area of fees assessed by labor organizations, that scrutiny is restricted to situations where amounts imposed are not truly "periodic dues and initiation fees" or are not "uniformly required," within the meaning of the second proviso to Section 8(a)(3) of the Act, or, in addition, are "excessive or discriminatory" within the meaning of Section 8 (b) (5) of the Act. *Ibid.*; *Ferro Stamping and Manufacturing Co.*, 93 NLRB 1459, 1464 (1951); *Bay Counties District Council of Carpenters (Assoc. Home Bldrs. of the Greater East Bay)*, 145 NLRB 1775, 1776 (1964).

It follows that if a labor organization proposes a union security clause that contravenes one of those proscriptions, then the obvious illegality, and its implications for the continued employment of noncomplying employees, might well entitle, indeed oblige, the employer to bargain about it to the extent of seeking to remove the illegal feature(s). However, there is no contention here that Respondent has made any agency fee proposal that violates Section 8(a)(3)'s second proviso nor that violates the "excessive or discriminatory" prohibition of Section 8(b)(5) of the Act.

It might be argued -- and such an argument is implied in the Employer's presentation at the hearing -- that bargaining is mandated to ensure that amounts of agency fees do not exceed the costs of collective bargaining, contract administration and grievance adjustment. Such an argument is predicated upon the above-described Railway Labor Act and public sector employment restriction on expenditure of agency fees, seeking to extend it to union security clauses negotiated under the Act. But while the Supreme Court has granted certiorari in *Beck*, it has not yet decided to similarly restrict expenditures of agency fees collected from nonmembers employed by employers subject to the Act. Nor in any other case has the Court imposed restrictions on expenditures of agency fees collected pursuant to union security clauses governed by the Act. Neither has the Board done so. To

the contrary, it stated in *Detroit Mailers Union No. 40 (Detroit Newspaper Publishers)*, 192 NLRB 951, 952 (1971):

> Neither on its face nor in the congressional purpose behind [the second proviso to Section 8(a)(3) of the Act] can any warrant be found for making any distinction here between dues which may be allocated for collective-bargaining purposes and those earmarked for institutional expenses of the union.

More specifically, in the Brief for the United States as Amicus Curiae filed in *Beck*, a majority of the Board specifically endorsed the argument that it is not an unfair labor practice for labor organizations to spend nonmembers' agency fees for purposes other than collective bargaining, contract administration and grievance adjustment.[7]

Even were the Court to adopt respondents' arguments in *Beck*, and to restrict amounts of agency fees in the fashion existing under the Railway Labor Act and in the public employment sector, that would not necessarily elevate that aspect of agency fees to mandatory bargaining status. To the contrary, several factors warrant the conclusion that it should remain a nonmandatory one, excluded from the bargaining process.

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[7]I am as bound by this position as I would be if the Board's view had been expressed in a decision resulting from a proceeding conducted under Section 10 of the Act. The general purposes of any system of jurisprudence would hardly be promoted if administrative agencies were free to advance one side of a proposition to the highest tribunal while preserving the option to simultaneously reach the contrary result in its own proceedings. In practice, the Supreme Court has relied upon propositions of statutory interpretation and policy expressed to it by the Board and its representatives, both in briefs, see, e.g., *Retail Clerks International Association, Local 1625 v. Schermerhorn*, 373 U.S. 756, 755-756 (1963), and in oral argument. See, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 594 (1969).

First, in reaching the results that it did in *Street* and in *Abood*, the court never adopted a *per se* restriction. Under the Railway Labor Act and in the public employment sector, the restriction on agency fee expenditures arises only for nonmembers who dissent from, or who object to, expenditure of their fees for purposes other than collective bargaining, contract administration and grievance adjustment. *Railway Clerks v. Allen*, 373 U.S. 113, 118 (1963); *Ellis v. Brotherhood of Ry. Clerks*, *supra*, 446 U.S. at 445. "Any remedies . . . would properly be granted only to employees who have made known to the union officials that they do not desire their funds to be used for political causes to which they object." *Machinists v. Street*, *supra*, 367 U.S. at 774. Consequently, the right to veto other expenditures is not a unitwide one, but rather one that rests with each employee on an individual basis. Within each bargaining unit some employees may choose to exercise their veto and some may not choose to do so. To subject the matter to the all or nothing result of bargaining would deprive individual employees of their right to make that choice. "[D]issent is not to be presumed - it must affirmatively be made known to the union by the dissenting employee." *Id.*

Concomitantly, to allow such a choice to be made as part of the bargaining process would, in effect, create a representative function for employers. Yet, industrial peace is not fostered by permitting employers to advance employee rights. *Brooks v. NLRB*, 348 U.S. 96, 103 (1954). Moreover, as there has been no showing that even a single bargaining unit nonmember has requested the Employer to negotiate a reduction in the agency fee, the Employer is attempting to "act[] as vicarious champion of its employees[,] a role no one has asked it to assume," *NLRB v. Tahoe Nugget, Inc.*, 584 F. 2d 293, 301 (9th Cir. 1978), cert. denied 442 U.S. 921, and a role which the Act does not contemplate being played by employers.

Third, to introduce this subject into the bargaining process would yield multiple results in an area that necessitates uniformity. Good-faith difference can exist concerning whether particu-

lar expenditures do or do not serve the purposes of collective bargaining, contract administration and grievance adjustment. That is amply illustrated, for example, by the disagreement over convention expenditures that occurred in *Ellis v. Brotherhood of Ry. Clerks*,, *supra*, 466 U.S. at 448-449, 458-460. The relative strengths of parties to negotiations will determine, at least to some extent, their ability to extract concessions. As a result, it is not inconceivable that the same expenditures may be included as a bargaining-related expense in some negotiated agency fees while simultaneously being excluded from calculation of agency fees in other contracts. Yet, the Court's decisions in this area do not contemplate a roving standard. Identical expenditures must be treated uniformly. The give and take of the bargaining process is simply not susceptible to achieving the singularity of approach that is needed.

Finally, as a practical matter, it would be futile to submit to bargaining determinations regarding the proper proportions of members' dues, or the dollars and cents amounts of agency fees, that are to be applied to collective bargaining, contract administration and grievance adjustment purposes. Of necessity, those proportions or amounts would be based upon expenditures made by labor organizations during periods prior to the effective dates of contracts. The negotiated proportions or amounts would then be locked into contracts which, as a matter of federal labor policy, are encouraged to last for three-year terms. See, *General Cable Corporation*, 139 NLRB 1123 (1962). But, like other institutions, expenditures of labor organizations will vary over time. As a result, nonmembers likely will be obliged to pay, and labor organizations obliged to accept, agency fee amounts only remotely tailored to actual expenditures, particularly as contracts wend toward their termination dates. It would hardly minimize the impact of labor instability upon interstate commerce to insist on periodic reopening of contracts to correct the problem, seeking to readjust agency fee amounts in light of more recent actual expenditures. At the same time, it hardly protects the rights of employees to compel them to continue observing agency fee amounts governed by the dead hand of stale expenditures.

In sum, the bargaining process is too broad and cumbersome a vehicle to ensure that nonmembers' agency fee amounts do not exceed the purposes of collective bargaining, contract administration and grievance adjustment, even assuming that the Supreme Court grants to employees of employers subject to the Act the same veto on agency fees that applies under the Railway Labor Act and in the public employment sector. During the hearing concern was voiced regarding the potential backpay liability of an employer who discharged a nonmember for failing to satisfy that portion of a contractually required agency fee exceeding the amount devoted to collective bargaining, contract administration and grievance adjustment. However, that concern arises any time that an employee's discharge is sought for noncompliance with union security requirements. Yet, employer liability is confined to situations where the employer has "reasonable grounds for believing" that the request is not a lawful one. See, e.g., *Valley Cabinet & Mfg., Inc.*, 253 NLRB 98, 99 (1980), enfd. *sub nom.* 691 F.2d 509 (9th Cir. 1982), and cases cited therein. Here, assuming the applicability of *Street* and *Abood*, an employer confronted with a demand to discharge a nonmember for nonpayment of an agency fee would not violate the Act unless it had "reasonable grounds for believing" that the nonmember had voiced the required objection to paying an amount exceeding representation costs and, further, that the nonmember's discharge was being sought for failure to pay that excess amount.

Therefore, I conclude that a preponderence of the evidence fails to establish that Social Services Union, Local 535, Service Employees International Union, AFL-CIO has refused to provide any information needed to implement an agreement concerning a mandatory subject of bargaining and, accordingly, it has not violated the Act in any manner alleged in the complaint.

Based upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[8]

I HEREBY ORDER that the complaint be, and it hereby is, dismissed in its entirety.

Dated: July 24, 1987

/s/
William J. Pannier III
Administrative Law Judge

[8]If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Napa, Solano, and
Sonoma Counties, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SOCIAL SERVICES UNION, LOCAL 535,
SERVICE EMPLOYEES INTERNATIONAL
UNION, AFL -- CIO

and Case 20-CB-7122

NORTH BAY DEVELOPMENT DISABILITIES
SERVICES, INC., d/b/a NORTH BAY
REGIONAL CENTER

ORDER CORRECTING

On June 22, 1988, the National Labor Relations Board issued an Order Denying Request for Stay and Motion for Reconsideration in the above-entitled proceeding in which there is an inadvertent omission.

IT IS ORDERED that said Order is corrected by adding the following to footnote 2.

"Accordingly, the motion to intervene is denied."

Dated, Washington, D.C., June 23, 1988.

By direction of the Board:

Joseph E. Moore

Deputy Executive Secretary

Napa, Solano, and
Sonoma Counties, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SOCIAL SERVICES UNION, LOCAL 535,
SERVICE EMPLOYEES INTERNATIONAL
UNION, AFL -- CIO

and Case 20-CB-7122

NORTH BAY DEVELOPMENT DISABILITIES
SERVICES, INC., d/b/a NORTH BAY
REGIONAL CENTER

ORDER DENYING REQUEST FOR STAY AND
MOTION FOR RECONSIDERATION

On February 19, 1988, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding.[1] On March 22, 1988, the Charging Party filed a Request for Stay and Motion for Reconsideration of the Decision and Order. In its motion the Charging Party contends that the Board erred in concluding that the Respondent did not violate Section 8(b)(3) of the Act by its failure to provide the Charging Party information requested in the course of bargaining concerning the amount of agency fees.

The Board, having duly considered the matter,

IT IS ORDERED that the Charging Party's Request for Stay and Motion for Reconsideration of the Decision and Order is

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[1] 287 NLRB No. 129

denied as containing nothing not previously considered by the Board and as lacking in merit.[2]

Dated, Washington, D.C., June 22, 1988.

By direction of the Board:

Joseph E. Moore

Deputy Executive Secretary

[2]On May 24, 1988, Karen Leslie Fuller, an employee of the Charging Party, filed with the Board a Motion to Intervene asserting that she is a "necessary party" in this proceeding under the Federal Rules of Civil Procedure. We note that the Federal Rules of Civil Procedure do not govern administrative proceedings. See *M.J. Santulli Mail Services, Inc.*, 281 NLRB No. 170 (Oct. 17, 1986), and cases cited therein; also see Sec. 10(b). Moreover, under the Act, as amended, it has been held that the only necessary parties are the General Counsel and the respondent(s). See *Prestige Bedding Company, Inc.*, 212 NLRB 690, 698 (1974). Intervention by other parties is at the discretion of the Board. See the Board's Rules and Regulations, 102.29; *Oughton v. NLRB*, 118 F.2d 486, 495-6 (3rd Cir. 1941) and, generally, *National Licorice Co v. NLRB*, 309 U.S. 350 (1940). Finally, we note that the unfair labor practice at issue in this proceeding concerns the duty of the Respondent Union, as a part of its overall duty to bargain collectively, to provide certain information requested by the Charging Party Employer. Such rights and obligations clearly attach only to the parties to a collective bargaining relationship.

(2)

No. 90-594

FILED
JAN 7 1991
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

NORTH BAY DEVELOPMENT DISABILITIES SERVICES, INC., D/B/A NORTH BAY REGIONAL CENTER, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that the amount of an agency shop fee is not a mandatory subject of bargaining and therefore the Union did not violate Section 8(b)(3) of the National Labor Relations Act, 29 U.S.C. 158(b)(3), by refusing the employer's request for financial information pertaining to the amount of that fee.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-594

NORTH BAY DEVELOPMENT DISABILITIES SERVICES, INC., D/B/A NORTH BAY REGIONAL CENTER, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 905 F.2d 476. The decision and order of the National Labor Relations Board (Pet. App. 8a-25a) are reported at 287 N.L.R.B. 1223. The order of the National Labor Relations Board denying a request for stay and motion for reconsideration (Pet. App. 27a-28a) and an order of the National Labor Relations Board correcting that order (Pet. App. 26a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1990. On August 30, 1990, Chief Justice Rehnquist granted an extension of time to and including October 5, 1990, within which to file a petition for a writ of certiorari, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In October 1986, petitioner and the Social Services Union, Local 535, Service Employees International Union, AFL-CIO (the Union), executed a collective-bargaining agreement that required covered employees either to join the Union or to pay an "agency fee" to cover the costs of union representation.[1] Under the agreement, the amount of the agency fee was to be negotiated between petitioner and the Union. Pet. App. 12a-13a. Petitioner proposed an agency fee equal to 20% of the periodic dues paid by Union members, and requested that if the Union found this amount unacceptable, it supply to petitioner a "detailed breakdown of all revenues and expenditures" of the Union and its parent International for the current and previous three years. *Id.* at 14a-15a.

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[1] An agency shop fee is the amount non-member employees subject to a union security contract are required to pay the union in lieu of dues. That amount may not exceed the employees' pro rata share of the union's costs of performing such activities as collective bargaining, contract administration, and grievance adjustment as exclusive representative of the employees. *Communication Workers* v. *Beck*, 487 U.S. 735, 762-763 (1988).

When the Union did not agree to the 20% figure and refused to furnish the requested information, petitioner invoked the collective bargaining agreement's arbitration clause. Pet. App. 15a-16a. Petitioner also filed an unfair labor practice charge against the Union, alleging that the Union's refusal to furnish the requested information violated Section 8(b)(3) of the National Labor Relations Act (the Act), 29 U.S.C. 158(b)(3). The General Counsel of the National Labor Relations Board issued a complaint against the Union based on that charge. Pet. App. 2a, 10a.

2. The administrative law judge held that "fees imposed by labor organizations are part of their internal relations with employees[,] and * * * are * * * no[t] a mandatory subject of bargaining." Pet. App. 19a. He ordered the complaint dismissed. The Board agreed, concluding that "the amount of agency fees is a nonmandatory subject of bargaining and that it is not transformed into a mandatory subject by virtue of the parties' agreement to bargain concerning it." *Id.* at 9a n.1, 17a-19a. Since "the duty to provide information is coextensive with the statutory duty to bargain concerning mandatory subjects" only, the Board also concluded that the Union had no duty to furnish the requested information. *Id.* at 8a-9a & n.1, 24a-25a. The Board adopted the recommended order of the administrative law judge and dismissed the complaint.

3. The court of appeals affirmed the Board's decision and denied the petition for review. Pet. App. 7a. The court first pointed out its "narrow" scope of review in light of the Board's "special expertise" in determining whether a matter falls within the "terms and conditions of employment" and is there-

fore subject to mandatory bargaining. *Id.* at 3a. The court concluded that the Board's position was "reasonably defensible" because "the amount of an agency fee concerns primarily the relationship between the union and the non-member employee," and not the relationship between the employer and its employees. *Id.* at 4a.

The court rejected petitioner's argument that the Board's decision was inconsistent with *Communication Workers* v. *Beck*, 487 U.S. 735 (1988). Noting that the *Beck* case "arose from a dispute between an employee and a union," and did not involve the issue of mandatory bargaining, Pet. App. 5a, the court read the case as "support[ing] the Board's position: because an agency fee must be based upon a union's representational expenses, it does not make sense to force a union to bargain with an employer over the amount of the fee, lest the resulting figure reflect the parties' relative bargaining strengths rather than the amount chargeable by some objective standard." *Ibid.*

Finally, the court agreed with the Board that the parties' agreement to bargain over the agency fee did not make it a mandatory subject, and that, because it was not a mandatory subject, the Union's refusal to furnish the requested information was not a violation of the Act. Pet. App. 6a.

ARGUMENT

The amount of an agency shop fee concerns primarily the relationship between a union and nonmember employees, not the relationship between an employer and its employees. Thus, that amount is not a term or condition of employment subject to mandatory bargaining. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

1. The National Labor Relations Act limits the subjects of mandatory collective bargaining to "wages, hours and other terms and conditions of employment." See Section 8(d) of the Act, 29 U.S.C. 158(d). "As to other matters, however, each party is free to bargain or not to bargain." *NLRB* v. *Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).[2] This Court has recognized the Board's "special expertise" in determining what is, and what is not, a mandatory subject. *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 495 (1979) (the determination "l[ies] at the heart of the Board's function"). Thus, the

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[2] The duty to bargain includes the obligation to provide necessary information that is relevant to issues about which the parties are obligated to bargain. *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 317-320 (1979); *Local 13, Detroit Newspaper Printing Union* v. *NLRB*, 598 F.2d 267, 270 (D.C. Cir. 1979). However, because the duty to furnish information derives from the duty to bargain, there is no duty to furnish information concerning topics that are not mandatory subjects of bargaining. *Western Massachusetts Elec. Co.* v. *NLRB*, 573 F.2d 101, 109-110 (1st Cir. 1978). Thus, contrary to petitioner's assertion (Pet. 9), the central issue of this case is whether or not the amount of an agency fee is a non-mandatory subject of bargaining.

Court will defer to the Board's decisions if they are "reasonably defensible." *Id.* at 497.

Although Section 8(d) "does not immutably fix a list of subjects for mandatory bargaining," *Allied Chem. Workers Local Union No. 1 (Chemical Workers)* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971), the list is limited to "issues that settle an aspect of the relationship between employer and employees." *Ibid.* Matters that involve relations between employees and the union are not terms and conditions of employment. See *ibid*; *Borg-Warner*, 356 U.S. at 350. In this case, the amount of money paid by employees to compensate the Union for its efforts in their behalf is a matter that concerns the relationship between the Union and the employees and has little, if anything, to do with the relationship between petitioner and its employees. Therefore, the court of appeals correctly deferred to the Board's determination that the amount of the agency shop fee was not a mandatory bargaining subject. The Board's conclusion is especially reasonable in light of the "policy Congress incorporated into the Act against outside interference in union decision-making." *NLRB* v. *Financial Inst. Employees*, 475 U.S. 192, 204 (1986).

2. Petitioner's contentions to the contrary lack merit. Petitioner principally contends (Pet. 8-9, 13-17) that the court of appeals' decision conflicts with *Communications Workers* v. *Beck*, 487 U.S. 735 (1988). This contention is incorrect. *Beck* held that an agency fee may not exceed an individual nonmember's proportional share of the union's expenses "germane to collective bargaining, contract administration, and grievance adjustment." 487 U.S. at 745. As the court of appeals correctly observed, that decision "has no direct bearing on this case, * * * be-

cause it arose from a dispute between an employee and a union over the amount of the agency fee, and did not raise the issue of whether the amount is a subject of mandatory bargaining between a union and an employer." Pet. App. 5a. Moreover, as the court of appeals cogently noted, the Board's decision is consonant with *Beck*'s holding that an agency fee cannot exceed a union's representational expenses. "[I]t does not make sense," the court said, "to force a union to bargain with an employer over the amount of the fee," for then "the parties' relative bargaining strengths," rather than an "objective standard," become determinative of the amount. *Ibid.*

Petitioner also incorrectly contends (Pet. 10) that *Borg-Warner* and other cases relied upon by the court of appeals are inapposite because they involved the relationship of a union to its members, while this case involves non-members. *Borg-Warner*, *Chemical Workers*, and the other cases relied on below hold that the scope of Section 8(d) is limited to matters that concern the relationship between the employer and its employees. Those cases draw no distinction between members and non-members. Plainly, the amount of money non-members must pay a union to represent them pertains primarily to the relationship between employees and the union, and not between the employees and their employer. The cases on which the court of appeals' opinion is based fully support its conclusion.

Petitioner contends (Pet. 13), again erroneously, that since the question whether or not to have an agency fee is a mandatory subject of bargaining under *NLRB* v. *General Motors*, 373 U.S. 734, 745 (1963), "the entire matter is open to negotiation," including, presumably, the amount of any such fee. If this argument had merit, then the amount of union

dues would also be a mandatory bargaining subject. However, both member's dues and the amount a union will spend on representation are quintessentially "internal union matter[s] of no proper concern to the employer." Pet. App. 5a. See *Financial Inst. Employees*, 475 U.S. at 204 n.11 (Congress rejected proposal that would have allowed Board to regulate dues); *Metal Workers Alliance, Inc.*, 172 N.L.R.B. 815, 815-816 (1968) (fees imposed by labor organizations subject to Board scrutiny "only in limited situations"); see also *United Steelworkers* v. *Sadlowski*, 457 U.S. 102, 117 (1982) (unions should be free to operate their own affairs). No different conclusion is required because a union may not fully protect the rights of non-members. The Court made plain in *Financial Inst. Employees* that the Board is not empowered to monitor more closely union internal policies on the ground that the "statutory scheme does not adequately protect [non-members'] interests." 475 U.S. at 205-206 (Board could not require non-member voting in union-conducted affiliation election). *Cf. Pattern Makers League* v. *NLRB*, 473 U.S. 95, 106 (1985) (Section 8(a)(3) of the Act "protects the employment rights of * * * the worker who never assumed full union membership").[3]

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[3] Petitioner asserts that the decision below "suggest[s] that collective bargaining as to the amount of agency fees is unlawful," and that the decision is thus at odds with *NLRB* v. *American Nat'l Ins. Co.*, 343 U.S. 395 (1952). Pet. 11. The decision below contains no such suggestion; it considers not whether the parties *may* bargain over the amount of an agency fee, but whether they *must*. And *American Nat'l Ins.* does not bear on that issue. Its holding—that the extent of management's retention of certain functions and prerogatives relating to its employees is a "condition of employment"

Nor is there merit to petitioner's assertion (Pet. 11, 20, 22, 23, 24) that the amount of agency fees became a mandatory bargaining subject "[b]ecause Petitioner * * * and the union had an express agreement to negotiate over the agency shop fee and to terminate any dispute in arbitration." Pet. 23. This Court rejected that argument in *Chemical Workers*, holding instead that a unilateral modification of (and refusal to negotiate over) contractual terms "is a prohibited unfair labor practice only when it changes a term that is a mandatory rather than a permissible subject of bargaining." 404 U.S. at 185. *Chemical Workers* added that "[b]y once bargaining and agreeing on a permissive subject, the parties * * * do not make the subject a mandatory topic of future bargaining"; rather, Section 8(d) has a "more specialized purpose than merely promoting general contract compliance." 404 U.S. at 187.[4]

Petitioner also mistakenly relies (Pet. 12-23) on *Ford Motor Co.* v. *NLRB*, 441 U.S. 488 (1979), where the Court affirmed a Board determination that the prices at in-plant cafeterias and vending machines constituted a mandatory subject of bargaining. In fact, *Ford Motor* supports the Board's position here, as it illustrates the kind of issue that directly implicates the employer/employee relationship, as opposed to the union/employee relationship at issue in this case. The "determinative aspect" of *Ford Motor*, Pet.

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subject to mandatory bargaining—sheds no light on the status under the Act of matters involving the relationship of the union to the employees it represents.

[4] The Court noted that "[t]he remedy for a unilateral mid-term modification to a permissive term lies in an action for breach of contract, * * * not in an unfair-labor-practice proceeding." 404 U.S. at 188.

22, was not, as petitioner asserts, that the parties had bargained over the issue before. Rather, it was that such prices "are matters of deep concern to workers" and are "germane to the working environment," and that "substantial" and "recurring disputes" arise over them that are well suited to resolution through collective bargaining. 441 U.S. at 498-499.[5]

Finally, there is no merit to the claim (Pet. 17-18) that, under the court of appeals' holding, petitioner would be guilty of an unfair labor practice for withholding from an employee's pay an excessive agency fee or for firing an employee who fails to pay such a fee. As the court of appeals noted (Pet. App. 5a-6a), an employer does not commit an unfair labor practice in those circumstances "unless [it] had reason to believe that the fee was unlawful." See *Helmsley-Spear, Inc.*, 275 N.L.R.B. 262, 268 (1985) (employer did not violate the Act by discharging employee pursuant to union's unlawful request where employer lacked reasonable ground to believe that request was unlawfully motivated).[6] *Helmsley-Spear* illustrates

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[5] Similarly incorrect is petitioner's suggestion that the amount of the fee is an "aspect of the employment relationship" because the agency fee is taken "out of wages which would otherwise be paid to [non-member employees] by their employer." Pet. 21. As explained above, regular member dues are not part of the employment relationship, although they too are typically withheld by the employer.

[6] Moreover, as the court of appeals noted, the Board has not yet addressed "the means by which an employee may properly challenge the level of an agency fee." Pet. App. 6a. The Board may reasonably conclude on this point that the employer should not become the representative of its employees' interests. Cf. *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 50 n.16 (1987), quoting *Brooks* v. *NLRB*, 348 U.S. 96, 103 (1954) ("inimical" to "industrial

once more that the amount of the fee concerns the employees' relationship with the union and has little to do with their relationship with the employer. The Board was eminently justified in determining that the agency fee was not a mandatory subject of collective bargaining.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1991

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peace" to allow employers to assert and rely on employees' rights).

[7] The *amicus curiae* brief of Karen Fuller, an employee of petitioner, reiterates petitioner's arguments and reflects the same erroneous reading of *General Motors*, *Beck* and the other cases discussed herein.

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No. 90-594

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OCTOBER TERM, 1990

NORTH BAY DEVELOPMENT DISABILITIES SERVICES, INC., D/B/A NORTH BAY REGIONAL CENTER,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S REPLY TO THE BOARD'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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No. 90-594

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

NORTH BAY DEVELOPMENT DISABILITIES SERVICES, INC., D/B/A NORTH BAY REGIONAL CENTER, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

PETITIONER'S REPLY TO THE BOARD'S BRIEF IN OPPOSITION TO GRANTING PETITION FOR WRIT OF CERTIORARI

Squarely presented here is the question not answered in *Beck*: whether the "legislative solution embodied in § 8(a)(3) allows employers" to collect dues equivalents from non-union workers under the NLRA in amounts "unrelated to collective bargaining expenses." *Communications Workers of America v. Beck*, 487 U.S. 735, 747, 758 (1988). In *Beck*, the Court ruled that "Congress understood § 8(a)(3) to...authorize the collection of only those fees necessary to finance collective bargaining activities." *Id.* at 759.

If under § 8(a)(3), unions are positioned to demand a bargaining agreement that requires non-member employees to pay more than a chargeable expenses fee to the union, then to insulate themselves from liability under § 8(a)(3), employers must be permitted to insist upon receiving information relating to the amount that the union seeks to charge those non-union employees. If not, then the employer has no defense to hybrid duty of fair representation employee lawsuits and charges of violating §

8(a)(3), an employer unfair labor practice. This interest is of maximum concern to employers covered by the Act.

The Board's Brief asserts that the "central issue" here is whether or not the amount of an agency fee is a non-mandatory subject of bargaining," NLRB Brief at 5 n.2. The Board incorrectly answers the question by arguing that the "amount of an agency fee concerns primarily the relationship between a union and non-member employees." This erroneous predicate leads the Board to conclude that the "amount" of the agency fee is not a mandatory subject of bargaining. Brief at 2. Petitioner, instead, submits that this issue is correctly resolved in two ways.

First, this Court has not *directly* answered whether the *amount* of the agency fee is comprised within the express language of Section 8(d) and whether that amount "wholly" involves an issue unrelated to mandatory collective bargaining requirements. However, petitioner believes that the Court's decisions in *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979), and *NLRB v. General Motors Corp.*, 373 U.S. 734 (1965), are dispositive.

Section 8(d) has never been interpreted by this Court as a *limitation* on the range of mandatory bargaining subjects. *Ford Motor Co.*, 441 U.S. at 495 (explaining that the original House bill was rejected in its attempt to "strait-jacket" and "limit narrowly the subject matters appropriate for collective bargaining"). Section 8(d), however, was enacted with the intent of not only mandating collective bargaining covering "wages, hours, and other terms and conditions of employment," but also "any question arising thereunder." The Board presents its opposition to the Petition by writing out this inclusive statutory language.

While suggesting that the underlying issue of agency fees, involves "the amount of money paid by employees to compensate the Union for its efforts in their behalf...has little, if anything, to do with the relationship between petitioner and its employees," the Board engages in linguistic acrobatics, because an employer is authorized under the Act to make any transfers of money to a

labor organization *only* from the "wages" of its workers. § 302, 29 U.S.C. § 186 (1947). See Pet. at 12. These transfers are made routinely through the payroll deduction of "dues." As *Ford Motor Co.* and *General Motors Corp.* directly and unequivocally imply, the union dues and agency fees nonmembers must pay as a condition of employment are a "term and condition of employment" and raise questions thereunder.[1]

There is no conundrum here. Since an employer must bargain over "terms and conditions of employment" under § 8(d), if under *Beck*, a union chooses to contract to take money directly from the *wages* of workers as agency fees (which in fact here include amounts beyond that authorized by § 8(a)(3) as incurred collective bargaining expenses), then some of this amount is "wages" wrongfully taken from non-members under *Beck*. *See Terry*, 110 S. Ct. at 1348. Therefore, an employer's negotiation of the *amount* of an agency shop fee directly implicates the "wages" and "terms and conditions of employment" provision under Section 8(d).

The Board's obfuscation of this fundamental point is best shown by its reading of *Ford Motor Co.*, where the Court ruled that in the circumstances of that case, bargaining over the price of in-plant cafeteria food was a bargainable issue. The Board, "order[ed] Ford to bargain on both food prices and services and to supply the Union with the relevant information requested." 441 U.S. at 493.

There, this Court found that the availability of food was "of deep concern to workers," but that "the company was not in the business of selling food." *Id.* at 498. Yet, the Court concluded that "the prices at which food is offered and other aspects of this service may reasonably be considered among those subjects about

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[1]The Board also does not dispute that this Court in *Teamsters, Local No. 391 v. Terry*, 110 S. Ct. 1339, 1348 (1990), concluded that the award an employee receives for a union's breach of the duty of fair representation is "wages and benefits."

which management and union must bargain." *Id.* Furthermore, "including within § 8(d) the prices of in-plant-supplied food and beverages would also serve the ends of the National Labor Relations Act." *Id.*

Taking the Board's own proposed test from the opening sentence of its Argument, the determinative question is whether an agency shop fee concerns primarily the relationship between a union and non-member employees. If that is the only test, in *Ford Motor Co.*, the determinative question would have been whether food prices concern primarily the relationship between the company and its vendor, not whether the existence of a cafeteria involves the relationship between the employees and the vendor/employer.[2]

As the Court recognized in *Ford Motor Co.*, 441 U.S. at 501, "'matters involving individuals outside the employment relationship...are not wholly excluded'" when "it vitally affects the "'terms and conditions' of their employment.'" *Quoting Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178, 179 (1971). The questions presented in this Petition plainly affect "matters" within the employment relationship. Since the questions also involve agency shop agreements, which the Board and this Court in *General Motors* have ruled are indeed a mandatory subject of bargaining, the dispute here involves "issues that settle an aspect of the relationship between employer and employees," *id.* at 178, and fit comfortably within the scope of § 8(d).[3]

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[2]The relative importance of the situation confronted in *Ford Motor Co.*, we suggest, is insubstantial when compared with the critical one found here.

[3]By also suggesting that the Board's position is reasonable in light of a policy to deny an employer the means to assert the interests of its workers, counsel for the Board engages in the same *post hoc* reasoning as the court below did. The Board never said in its Decision that North Bay attempted to represent worker interests and specifically accepted only one conclusion of the ALJ, *i.e.*, the amount of agency fees is a nonmandatory subject of bargaining. Pet. App. 9a n.1. The attempt to resurrect this dead issue is improper, *Metropolitan Life In-*

The fine line drawn by the Board between the "amount" of the agency shop fees found non-mandatory vis-a-vis North Bay and the "price" of cafeteria food found to be mandatory in *Ford Motor Co.* is insupportable. Again, the central question here is whether section 8(a)(3) prohibits the *employer's* collection of 100% of a voluntary member's dues from nonmembers. This issue is especially important where the employer knows that since "dues equivalents from nonmembers in any *amount*" is not permitted, *Beck*, 487 U.S. at 759, a union's bargaining demand for a dues equivalent agency fee simultaneous with a refusal to show that all its expenditures are chargeable collective bargaining costs, puts the employer on notice that the fee is illegitimate. In that case, as here, the inclusion of a dues equivalent agency fee exposes the employer to liability for fees actually received by the union. *See Kaiser Steel Corp.*, 211 N.L.R.B. 446, 451-52 (1974) (requirement of fair dealing imposed by the Board on both employer and union when applying union security contracts).[4] The importance of this issue to employers, unions, and employees underscores the need for this Court's review.

2. The Board's position that the amount of the agency fee is an internal union matter outside of an employer's § 8(a)(3) reach, misconstrues this Court's decision in *NLRB v. General Motors*,

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surance Co. v. NLRB, 380 U.S. 438 (1965), and is not substantiated in this record.

[4]As emphasized in the brief of amicus curiae Karen Leslie Fuller, North Bay has been required to collect agency shop fees "equal to the Union's periodic dues and initiation fees to the Union." Brief at 13 n. 41; *In re Service Employees Int'l Union & North Bay Regional Center*, AAA Case No. 74-30-0010-87 (1987). In *Beck*, 487 U.S. at 759 (emphasis added), the Court stated that Congress did not leave "unions free to exact dues equivalents from nonmembers in any amount *they please*, no matter how unrelated those fees may be to collective bargaining activities." With the approval of the court of appeals, the Board's Decision below reverses the Court's explicit ruling in *Beck* by rewriting § 8(a)(3) to permit unions to demand the collection of agency fees in "any *amount* they please." This authorization is contrary to the Court's above stated *ultra vires* prohibition against unrestricted union authority to do precisely that.

373 U.S. 734 (1963), and ignores the way nonmembers' fees are collected. At bar, the question does not involve an employer's attempt to set union members' dues, but concerns its 8(a)(3) liability and commensurate responsibility not to collect more dues from the wages of its non-member employees than the law allows. Consequently, the Board's reliance upon internal union voting cases such as *NLRB v. Financial Inst. Employees*, 475 U.S. 192 (1986) (affiliation vote does not raise a question concerning representation), *United Steelworkers v. Sadlowski*, 457 U.S. 102 (1982) (LMRDA does not restrict internal union rule against members' receipt of outside contributions to fund campaigns for union office), and *Metal Workers Alliance, Inc.*, 172 N.L.R.B. 815 (1968) (amount of union reinstatement fee set by the union not violative of § 8(b)(5) unless excessive), is misplaced because the cases are distinguishable.[5]

Yet, the question studiously avoided by the Board is what *does* § 8(a)(3) provide. The Board agrees that § 8(a)(3) protects the non-union worker at least in some circumstances. Brief at 8.

With the definitive statutory construction given by this Court in *Beck* to § 8(a)(3) and union collection actions, it is contrary to the statute for the Board to deny the Act's protection to non-members by suggesting that it *might* in the future hold that an employer does not commit an unfair labor practice when it collects 100% of union dues from its non-member workers. Brief at 10. Such a holding, were it to occur, would not immunize employers from employees' claims, as the Board suggests. Employees can bring their claims in federal courts, under *Glover v. St. Louis-San Francisco Ry.*, 393 U.S. 321, 331 (1969) (Harlan,

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[5]In fact, a union's legitimate interest in a non-member is "in the most limited sense." *Pattern Makers of America*, 473 U.S. 95 n.16 (1985). That financial "relationship" is established by the employer and union under § 8(a)(3). It is not created by the union acting unilaterally under the auspices of § 8(a)(3). It is therefore difficult to comprehend any basis in fact or law for the Board's argument that the employer's collection of an agency fee has nothing to do with the employment relationship of its non-union employees.

J.; concurring). In any event, speculating about what the Board may do in the future, which may possibly be sustained by this Court, is the very worst kind of *post hoc* argument.[6]

The Board decided this case *before* this Court's decision in *Beck*, refused to reconsider it in light of *Beck*, and never sought to recall the case from the court of appeals to address *Beck*. In any event, neither the Board nor the court of appeals below held, or even suggested, that employers have *no* liability to employees for complicity in a union's *Beck* violations. Even now, the Board will go no further than to say "the amount of the agency fee concerns *primarily* the relationship between the union and the nonmember employee." Board Brief at 4. It does not, and could not, say that the "amount of an agency fee concerns [*exclusively*] the relationship between the union and the non-member employee," for it is not the membership relation, but the employment relationship that is of concern here.

The Board's position could only be true if § 8(a)(3) did not exist, nonmember fees were never a "condition of employment," and unions collected fees from nonmembers solely in judicial proceedings, with the commensurate protection provided through judicial procedures.

The Board's stated position regarding *General Motors Corp.* and *Beck* is also irrational in view of the Act's policy of voluntary unionism. The Board concocts a distinction between stating the nonmembers' fee in terms of language as opposed to stating that fee as a figure. There is no such distinction.[7]

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[6]This possible future action, as *Kaiser Steel*, *supra* at 5, shows would be contrary to the Board's existing precedent.

[7] *General Motors Corp.* makes requiring nonmembers to pay a "dues-equivalent" amount a mandatory subject of bargaining. Assuming "dues" to be $100.00, there is no reason to believe the nonmember obligation could not be stated as a figure : $100.00, under *General Motors Corp.*, rather than through use of the language "dues-equivalent." *Beck* makes clear that "dues" under § 8(a)(3) is *not* the voluntary dues of a full member, but is a charge for "collective

Finally, the Board's brief, page 11 n.7, erroneously suggests that the *amicus curiae* brief of Karen Leslie Fuller is mere duplication of the arguments made by this Petitioner. Our reading of the *amicus* brief shows that her arguments are not duplicative of the Petition, but that the whole question of nonmembers' fees is presented from the standpoint of the employees who must pay them, not the employers who include that obligation in a collective bargaining agreement. The arguments of the *amicus curiae* cannot be footnoted away, as the Board attempts to do. The Board's failure to address those arguments, never mind refute them, is an admission that it cannot do so. Petitioner commends the *amicus curiae* brief to the Court's reading, especially in view of the Board's demurrer to the arguments made there.

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bargaining, contract administration, and grievance adjustment."

Applying *General Motors Corp.* and *Beck*, then, the nonmembers' obligation could be stated in language, to wit: "a pro rata share of the union's costs of collective bargaining, contract administration, and grievance adjustment." Assuming a voluntary members' dues to be $100.00, and the costs of collective bargaining to be $21.00, there is no reason in *General Motors Corp.* that the *Beck* collective bargaining charge cannot be stated as a figure, $21.00, rather then through use of language. Either both the figure and the language are "mandatory subjects of bargaining" or neither is. *General Motors Corp*, Petitioner believes, has already answered that question.

CONCLUSION

The briefs now before the Court demonstrate that the question of agency fee agreements is a most serious and important issue affecting modern labor relations. Unless this Court grants plenary review now, the question whether an employer is entitled to obtain information necessary to protect itself from liability for violations of section 8(a)(3) and complicity in duty of fair representation cases, will be lost.

WHEREFORE, Petitioner respectfully requests that the Court issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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No. 90-594

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

NORTH BAY DEVELOPMENT DISABILITIES SERVICES, INC., D/B/A NORTH BAY REGIONAL CENTER,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF *AMICUS CURIAE* OF KAREN FULLER, EMPLOYEE, IN SUPPORT OF PETITIONERS

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NATIONAL LABOR RELATIONS BOARD,

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BRIEF *AMICUS CURIAE* OF KAREN FULLER, EMPLOYEE, IN SUPPORT OF PETITIONER

INTRODUCTION

Pursuant to Rule 37.2 of the Rules of this Court, Karen Fuller ("Ms. Fuller"), an employee, submits this brief *amicus curiae* in support of the petitioner, North Bay Development Disabilities Services, Inc., d/b/a North Bay Regional Center ("North Bay"), at relevant times her employer, urging reversal of the decision of the United States Court of Appeals for the District of Columbia Circuit. The petitioner and the respondent have consented to the filing of this brief, and their consent letters accompany this brief.

INTEREST OF THE *AMICUS CURIAE*

Ms. Fuller was, at relevant times, an employee of North Bay. North Bay had recognized the Service Employees International Union, Local 535 ("Local 535") as the "exclusive representative" under § 9(a) of the National Labor Relations Act[1] for the purposes of collective bargaining over the terms and conditions of employment of employees in a defined bargaining unit. One of the terms and conditions of employment to which North Bay and Local 535 had agreed was the Agency Shop provision which is the subject of the present litigation, and which made the required payments a condition of the employees' employment.[2]

That Agency Shop provision was a term and condition of Ms. Fuller's employment. Ms. Fuller objected to paying Local 535 more than could be required under applicable law. As she could have been terminated from employment for noncompliance with the Agency Shop provision, despite her objections to excessive payments, that provision established her rights and obligations in the first instance. She, therefore, has an interest in submitting this brief *amicus curiae* to state the views of employees with respect to the issues presented by the instant petition.

Specifically, Ms. Fuller is concerned with what she believes are the plainly erroneous conclusions and rulings of the court of appeals which vitally impact upon employees' freedoms, namely that:

- No employee objected to the imposition of the dues-equivalent Agency Shop with its potential for excessive exactions;

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[1] 29 U.S.C. § 159(a) (West 1990).

[2] "Agency Shop" will herein refer to those agency shop provisions which on their face require employees who *are not* members of the union to pay amounts equivalent to a voluntary member's dues as a condition of their employment, both generally and as to the North Bay/Local 535 agreement.

• the amount of fees an employee must pay under an Agency Shop is *not* a mandatory subject of bargaining, despite this Court's decision in *General Motors*;[3]

• the Agency Shop is privileged by the proviso to § 8(b)(1)(A)[4] as being within the "right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership," despite the impact of the Agency Shop upon *nonmembers* and this Court's decisions in *Beck*[5] and *Pattern Makers*.[6]

In addition, because of the severe analytical and practical difficulties presented by the decision of the court of appeals, Ms. Fuller urges the Court to grant certiorari and consider whether the negotiation of an Agency Shop provision which either does not accurately inform bargaining unit employees of their financial obligations to the union, or which actively misleads employees as to those financial obligations, is an illegal subject of bargaining.

SUMMARY OF ARGUMENT

The decision of the court of appeals cannot be squared with this Court's decision in *General Motors*[7] establishing the requirement that parties negotiating collective bargaining agreements must, as a mandatory subject of bargaining, bargain over nonmembers' financial obligations to the union. *General Motors* has been universally interpreted and applied to make the Agency Shop, in which nonmembers must pay amounts equal to a

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[3] *NLRB v. General Motors*, 373 U.S. 734 (1963) (*"General Motors"*).

[4] 29 U.S.C. § 158(b)(1)(A) (West 1990).

[5] *Communications Workers v. Beck*, 487 U.S. 735 (1988) (*"Beck"*).

[6] *Pattern Makers' League v. NLRB*, 473 U.S. 95 (1985) (*"Pattern Makers"*).

[7] 373 U.S. 734 (1963).

voluntary member's dues, facially valid, even where employees object to paying no more than the law requires. However, *General Motors* did not anticipate and address how that bargaining obligation is affected—or, indeed, limited—by the rights of nonmember employees under the general "policy of voluntary unionism" expressed in *Pattern Makers*.[8] Neither did *General Motors* anticipate and address how that bargaining obligation is affected, and most assuredly limited, by *Beck*,[9] to a requirement that nonmember employees pay not a dues-equivalent amount, but a fee to defray the union's costs of collective bargaining.

This case, Ms. Fuller submits, provides an excellent record which precisely frames the issues we believe this Court should address in light of *Beck* and *Pattern Makers*. The contradiction between *General Motors* and *Beck* leaves a vast discrepancy between those Agency Shop provisions in the mass of collective bargaining agreements, which on their face purport to require dues-equivalent payments, and the fact that *Beck* stands as unequivocal precedent prohibiting such agreements. What is needed by the National Labor Relations Board, the courts, employers, unions, and employees, is for this Court to explicitly interpret *General Motors* in light of *Beck*. For, unless this Court intervenes, dues-equivalent obligations will perpetually be imposed upon nonmembers, as a practical matter, in anachronistic (and even disingenuous) reliance upon *General Motors*, simply because *Beck* addressed Agency Shop provisions from the standpoint of employee rights and the "policy of voluntary unionism," rather than from the standpoint of the bargaining obligations of unions, such as Local 535, and employers, such as North Bay. Certiorari is warranted to reconcile the bargaining obligations of unions and employers under *General Motors* with employee freedoms under *Beck*.

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[8] 473 U.S. 95, 104-05 (1985).

[9] 487 U.S. 735 (1988).

ARGUMENT

Employee Objection to the Agency Shop

The court of appeals erroneously concluded that the existence of an employee objecting "to the amount of the fee to be withheld [is] a feature notably absent from this case."[10] It also erroneously concluded that the petitioner was attempting to "appoint itself the representative of some hypothetical non-union employees who may object to the amount of the agency fee set by the union."[11] Nothing could be further from the truth.

In fact, Ms. Fuller was an employee who objected "to the amount of the fee to be withheld"; thus, there was an *actual* employee, with an *actual* objection, for North Bay to be concerned about, and no need at all to concoct "some hypothetical non-union employees who *may* object to the amount of the agency fee set by the union."[12]

Ms. Fuller's objection appears throughout the record in this case, both before the National Labor Relations Board ("NLRB") and the court of appeals. First, while the case was pending before the NLRB on North Bay's motion for reconsideration, Ms. Fuller filed a motion to intervene and a brief as intervenor in support of reconsideration.[13] Ms. Fuller's motion to intervene was denied by an Order of the NLRB.[14]

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[10] See Petitioner's Appendix ("App. __") at 6a.

[11] *Id.*

[12] *Id.* (emphasis added).

[13] These documents are contained in the administrative record in this case, and were filed under certificate of service dated May 24, 1988.

[14] Order dated June 23, 1988, by direction of the NLRB, per Joseph E. Moore, Deputy Executive Secretary (App. at 26a).

Second, Ms. Fuller filed a petition for review of the NLRB's decision with the United States Court of Appeals for the District of Columbia Circuit, obviously the same court which issued the decision of concern in the instant case.[15] The petition sought review of the NLRB's denial of Ms. Fuller's motion to intervene and of the merits of the NLRB's decision on the complaint before it. The court of appeals dismissed Ms. Fuller's petition as to the merits of the NLRB's decision on grounds that she was not a "person aggrieved under 29 U.S.C. § 160 (f)," and ordered Ms. Fuller to show cause why the denial of intervention "should not be summarily affirmed."[16] Because of the court of appeals' ruling on the merits, Ms. Fuller sought leave to withdraw her petition insofar as it addressed intervention, which was granted.

In addition, while the instant case was pending in the court of appeals, Ms. Fuller sought to protect her interests by filing an *amicus* brief, to which both North Bay and the NLRB consented. Despite that consent and the actual filing of the brief, Ms. Fuller's *amicus* brief was rejected by the court of appeals under a local rule.[17]

Ms. Fuller does not here contest the validity of the decisions of the NLRB or the court of appeals in these instances. She recites this history to show that there is *no* basis in fact for the court of appeals' stated conclusions in the decision below that an objecting employee was "notably absent" from the case, and that, in asserting employees' rights before the court, North Bay was abstractly representing the interests of "some hypothetical non-union employees who may object to the amount of the agency fee

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[15] Ms. Fuller's petition for review was filed as *Fuller v. NLRB*, No. 89-1269 (D.C. Cir. filed Apr. 25, 1989).

[16] *Fuller v. NLRB*, No. 89-1269 (D.C. Cir. Aug. 15, 1989).

[17] The brief was rejected as untimely under the court of appeals' Rule 11 (e) (4) which requires an *amicus* to file the parties' consent or a motion for leave to file a brief within thirty days of the docketing of the case with the court. Ms. Fuller acknowledges that such action was not taken within the time required.

set by the union." The court of appeals was in error in reaching these unsupportable conclusions, conclusions which appear seriously to have affected (or even infected) the outcome of the court's deliberations. Therefore, this Court should examine the record, reasoning, and decision of the court of appeals *de novo*, without according the usual deferential review.

Agency Shop Fees and Bargaining

The court of appeals reached a series of erroneous conclusions resulting in the ultimate judgment that Agency Shop fees are *not* a mandatory subject of bargaining under this Court's decision in *General Motors*.[18] First, it concluded that Agency Shop requirements are akin to the "right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership"[19] found in the proviso to § 8(b)(l)(A) of the NLRA.[20] Ms. Fuller does not question the existence of labor organizations' right to prescribe rules for members under that section of the NLRA. She submits, however, that the right of a union to impose restrictions on the "acquisition or retention of membership" has no bearing whatsoever on the rights of nonmembers, such as Ms. Fuller, to be free from compulsory unionism.

The § 8(b)(1)(A) proviso was raised by the union in *Pattern Makers*.[21] There, the union claimed that the proviso allowed it to restrict the right of employees to resign from membership. This Court explicitly rejected that view of the proviso, saying, "[n]either the [NLRB] nor this Court has ever interpreted the proviso

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[18] *NLRB v. General Motors*, 373 U.S. 734 (1963).

[19] App. at 4a.

[20] 29 U.S.C. § 158(b)(1)(A) (West 1990).

[21] *Pattern Makers' League v. NLRB*, 473 U.S. 95 (1985).

as allowing unions to make rules restricting the right to r sign."[22] Clearly, if the proviso cannot be employed by the uni to retain unwilling employees as members, it cannot be employe either, to justify unilateral union control over Agency Shop fe nonmembers must pay as a condition of their employment. Fo in both cases, the paramount consideration is the "policy voluntary unionism" implicit in § 8(a)(3).[23]

The court of appeals also concluded that "this is not a ca of [the] character" in which the union's enforcement of the fe "affects employment status."[24] The court similarly conclude that "the amount of an agency fee concerns primarily th relationship between the union and the non-member employee it is not 'an aspect of the relationship between the employer an employees.'"[25] In reaching these conclusions, the court ove looks or ignores the language of the North Bay/Local 535 Agen Shop, itself, the language of § 8(a)(3) of the NLRA, this Court relevant decisions in *Beck*[26] and *Hudson*[27], and the importance the language contained in Agency Shops to the practical achiev ment of the "policy of voluntary unionism."

The North Bay/Local 535 Agency Shop

The relevant North Bay/Local 535 bargaining agreeme provides:

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[22] *Id.* at 108.

[23] *Id.* at 104. Section 8(a)(3) is found in 29 U.S.C. § 158(a)(3) (West 199

[24] App. at 4a.

[25] *Id.*

[26] *Communications Workers v. Beck*, 487 U.S. 735 (1988).

[27] *Chicago Teachers v. Hudson*, 475 U.S. 292 (1986) ("*Hudson*").

> Agency Shop. *Each employee* covered by this Agreement who is hired after September 12, 1986 *shall, as a condition of continued employment*, within thirty (30) days of first employment at the Center, either 1) become and remain a member in good standing of the Union, or 2) commence and continue to make payment(s) of an amount equal to the Union's periodic dues and initiation fees to the Union as a service fee for Union representation, except such amount shall not exceed that amount as outlined or required by the pertinent case law.
>
> The parties agree to meet and develop language to be included in this agreement concerning the amount of Agency fee to be paid in lieu of Union dues by persons in the unit who do not belong to the Union. The parties agree to be bound by the relevant U.S. Supreme Court Decisions on the subject. Such discussions shall be held during the months of November and December, 1986 and resolution shall be attained by December 31, 1986 or the issue shall be submitted to an arbitrator from a panel supplied by the American Arbitration Association (AAA). (Emphasis added.)

As is plain on the face of this language, nonmember employees, such as Ms. Fuller, must make the payments required, *as a condition of their employment*. Thus, there is no basis in fact for the court of appeal's finding that "this is not a case of [the] character" in which the agreement, its enforcement, or the potential for its enforcement "affects employment status." The quoted language, particularly the "condition of employment" requirement, clearly and unequivocally "affects employment status," and the court of appeals was simply wrong in concluding otherwise.

Section 8(a)(3)

The court of appeals' conclusion, noted above, that "the amount of an agency fee concerns primarily the relationship

between the union and the non-member employees; [and]it is not 'an aspect of the relationship between the employer and employees,'" is reached in defiance of the North Bay/Local 535 Agency Shop provisions quoted above, as well as § 8(a)(3) of the NLRA. It is clear that the parties' Agency Shop requires involuntary employee payments as a "condition of their employment." The "condition of employment" language is always and everywhere understood to mean that an employee, such as Ms. Fuller, who fails to comply *will be discharged from employment.* Obviously, the employee is an employee of the employer, not the union. Just as clearly, only the employer (not the union) can discharge the employee from employment. Thus, contrary to the court of appeals, the existence of an Agency Shop, such as the one here, is "an aspect of the relationship between the employer and employees."

The plain language of § 8(a)(3) supports this conclusion. The existence of the Agency Shop is privileged only because of this Court's conclusion that the language of the section is construed to mean that nonmember employees must pay to defray the union's costs of negotiating and enforcing the applicable collective bargaining agreement.[28] The section, on its own terms, imposes obligations on *employers* not to violate employees' rights.[29] The fact that the very section of the statute authorizing Agency Shops pertains to employers completely undermines the court of appeals' view that such arrangements are "not an aspect of the relationship between the employer and employees."

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[28] This negotiation and enforcement function is commonly referred to as "collective bargaining, contract administration, and grievance adjustment." *Communications Workers v. Beck*, 487 U.S. 735, 745 (1988).

[29] The union violations most frequently linked with employers' § 8(a)(3) violations are in an entirely different section of the NLRA, the 8(b) series, namely § 8(b)(1)(A) (union actions which restrain or coerce employees) and § 8(b)(2) (union attempts to cause employer discrimination under § 8(a)(3)). Section 8(b)(1)(A) and § 8(b)(2) of the NLRA are, respectively, 29 U.S.C. § 158 (b)(1)(A) and § 158(b)(2) (West 1990).

Beck/Hudson

This Court has addressed the "policy of voluntary unionism" as it affects Agency Shops in a series of cases beginning with *Machinists v. Street.*[30] The two most recent decisions which apply that "policy" to define the limits of nonmembers' obligations under Agency Shops are *Hudson*,[31] which sets forth substantive limitations and procedural protections in the public-sector, and *Beck*,[32] stating the substantive limitations in the private-sector. *Hudson* holds that "*the government* and union have a responsibility to provide procedures that minimize that impingement [the Agency Shop makes on employees First Amendment rights] and that facilitate a nonunion employee's ability to protect his rights."[33] *Beck* is even more apposite here; it makes plain that the Court "granted certiorari to resolve the important question concerning the validity of such [employer/union Agency Shop] agreements,"[34] that "§ 8(a)(3) places [limits] on *the negotiation* and enforcement of [Agency Shops],"[35] and that "the rationale underlying § 8(a)(3) [is to] prohibit[ ] the collection of fees that are not germane to representational activities."[36] The emphasis this Court has placed in these cases upon the *negotiation* of provisions of the bargaining agreement and proscriptions upon excessive *collections* clearly implicates employers, for without the employers there would be

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[30] 367 U.S. 740 (1961).

[31] *Chicago Teachers v. Hudson*, 475 U.S. 292 (1986).

[32] *Communications Workers v. Beck*, 487 U.S. 735 (1988).

[33] 475 U.S. at n.20 (emphasis added). In *Hudson*, of course, "the government" is the employer.

[34] 487 U.S. at 741-42.

[35] *Id.* at 745 (emphasis added).

[36] *Id.* at 760.

no negotiations, and without Agency Shops there would be not even the potential for excessive exactions or collections from unwilling employees.[37]

Practical Achievement of Voluntary Unionism

This Court has said that § 8(a)(3) "provide[s] only the most grudging authorization of such [Agency Shop] agreements."[38] That conclusion appears to us entirely consistent with, and, indeed, the fulfillment of, the "policy of voluntary unionism" contained in the NLRA.[39] However, if the circuit court's decision below stands, the limitations in the statutory authorization for Agency Shops and the policy of voluntary unionism will not simply be diminished, but will be nullified outright.

The problems are practical. First, the "condition of employment" language threatens the very working lives of the employees involved. The sanction is "industrial capital punishment" imposed for no reason connected with the employees' ability, experience, or willingness to perform diligent work. Second, the "condition of employment" language threatens this sanction with no prior judicial determination of the validity of the amount of the fee demanded.[40] But perhaps most fundamentally, the "condition of employment" language, coupled with the "dues-equivalent" Agency Shop language which appears on the face of the agreement, gives every union officer and shop steward written substan-

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[37] We assume that under the "policy of voluntary unionism," nonmembers would always be free to contribute funds to the union which exceed the collective bargaining charge under *Beck*. The point here, however, is that contributions above the *Beck* amount cannot be compelled by employer/union Agency Shops which are negotiated or enforced under § 8(a)(3).

[38] *Communications Workers v. Beck*, 487 U.S. 735, 755 (1988).

[39] *Pattern Makers' League v. NLRB*, 473 U.S. 95, 105 (1985).

[40] Loss of employment in such circumstances is "irreparable harm" in every practical sense.

tiation for demands for the exaction and collection of fees which are excessive, and potentially even grossly excessive, under *Beck*, *Hudson*, and related precedents.[41]

There is, then, no reason in the NLRA, this Court's decisions, or practical wisdom for the decision below. As shown, that decision undermines the basic policies of the NLRA as declared by this Court.

Illegal Bargaining Subject

Ms. Fuller has here stated, in unequivocal terms, her conclusion that the decision below cannot be squared with this Court's precedents. Nevertheless, she shares, for the general case, the concern the court of appeals has for the possibility that "the resulting [Agency Shop] figure [will] reflect the parties' relative bargaining strengths rather than the amount chargeable [under *Beck*] by some objective standard."[42] She is mindful that many, if not most, employers will not endeavor, as North Bay did, to protect employees' *Beck* rights. For, in general, the Agency Shop language which results from the negotiating process does *not* reflect the "amount chargeable by some objective standard," but instead reflects the fact that when Agency Shop provisions are negotiated, nonmembers are not represented at all, and that in the process a company is "giving up what it valued least while the union was getting what it wanted most."[43]

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[41] Nowhere is that problem more clearly illustrated than the instant case in which an arbitrator concluded that employees must pay dues-equivalent amounts, despite the limitations contained in the North Bay/Local 535 Agency Shop. *In re Service Employees Int'l Union & North Bay Regional Center*, AAA Case No. 74-30-0010-87 (1987) (Concepcion, Arb.) ("Each employee covered by this Agreement...shall...commence and continue to make payment(s) of an amount equal to the Union's periodic dues and initiation fees to the Union.")

[42] App. at 5a.

[43] Bradley, *The Freedom of the Individual under Collectivized Labor Arrangements*, in The Public Stake in Union Power 152 (P. Bradley ed. 1965).

Thus, the court of appeals' goal that the Agency Shop fee result from an "objective standard" is *not* dealt with by the court's decision.[44] Indeed, the result below mistakenly perpetuates dues-equivalent Agency Shops in outright defiance of *Beck* and the very concern that the court itself stated. More alarming is the fact that if the court of appeals' decision stands, an "objective standard" will, in all probability, almost never be employed in the language of Agency Shop provisions. The most likely result—and one which is the exact opposite of what the court of appeals intended—is that the language of such provisions will continue to reflect many factors other than an "objective standard," including the very factor the court of appeals intended *not* play any role in negotiating Agency Shop provisions, namely the "relative bargaining strengths" of the parties.

CONCLUSION

The foregoing reasons fully warrant this Court's consideration of the issues raised by this case on certiorari. Ms. Fuller supports certiorari because present practice regarding dues-equivalent Agency Shop provisions subverts employees' general rights under the "policy of voluntary unionism" and their particular rights under *Beck* to pay no more than their *pro rata* share of collective bargaining costs to the union which is their exclusive representative. This practice, to a large extent, occurs because this Court's decisions in *Beck* and *Pattern Makers* do not explicitly address the implications of those cases for employer/union collective bargaining obligations where Agency Shop provisions are concerned. To remedy this untenable situation, which daily and repeatedly results in the negotiation and enforce-

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[44] *Compare Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1000 (9th Cir. 1970). ("[T]he limitation asserted here does in fact constitute an implied term of the contract.")

ment of Agency Shop provisions which cause the forfeiture of employees' rights, this Court should grant certiorari. Briefs on the merits, we respectfully suggest, should assist the Court in reconciling employer/union bargaining obligations to employees' rights to "voluntary unionism" under *Beck*.

Respectfully submitted,

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